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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1932

No. 227

RICHARD REID ROGERS, PETITIONER,

vs.

GUARANTY TRUST COMPANY OF NEW YORK, JUNIUS PARKER, GEORGE W. HILL, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED JULY 15, 1932

CERTIORARI GRANTED OCTOBER 17, 1932

(36,924)

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United States District Court

SOUTHERN DISTRICT OF NEW YORK.

RICHARD REID ROGERS, Plaintiff, against GUARANTY TRUST COMPANY OF NEW YORK, JUNIUS PARKER, GEORGE W. HILL, C. F. NEILEY, A. C. MOWER, VINCENT RIGGIO, CHARLES A. PENN, J. B. HARVIE, R. J. BOYLAN, C. S. KEENE, J. K. FLETCHER and THE AMERICAN TOBACCO COMPANY, Defendants.	In Equity 59-307. Consolidated Cause.
RICHARD REID ROGERS, Plaintiff, against THE AMERICAN TOBACCO COMPANY and T. R. TAYLOR, Defendants.	

Statement.

This is a consolidated cause, formed of two original suits, as follows:

First, an action instituted in New York County Supreme Court by plaintiff, Richard Reid Rogers, against The American Tobacco Company, T. R. Taylor, George W. Hill, C. F. Neiley, A. C. Mower, Vincent Riggio, Charles A. Penn, J. B. Harvie, R. J. Boylan, C. S. Keene, Nathan

Weiss and J. K. Fletcher. Summons served February 20 to March 3, 1931. Removed to United States District Court for Southern District of New York by petition of The American Tobacco Company served March 9, 1931, and by petition of T. R. Taylor served March 10, 1931, in each case on the ground of diverse citizenship, it being claimed that said company and T. R. Taylor were citizens of New Jersey. Record filed in United States District Court March 23, 1931. On motion of plaintiff, this action was discontinued April 6, 1931, as to all defendants other than The American Tobacco Company and T. R. Taylor.

Second, an action instituted in New York County Su-
5 preme Court by plaintiff, Richard Reid Rogers, against defendants Guaranty Trust Company of New York, Junius Parker, George W. Hill, C. F. Neiley, A. C. Mower, Vincent Riggio, Charles A. Penn, J. B. Harvie, R. J. Boylan, C. S. Keene, J. K. Fletcher, and The American Tobacco Company. Summons served on Guaranty Trust Company, Parker, Hill, Riggio and Boylan April 10, 1931, on Harvie and The American Tobacco Company April 13, 1931, and on Penn April 16, 1931. Defendants Neiley, Mower, Keene and Fletcher have not been served. Penn has died, and the action has not been revived against his estate. Therefore, the only defendants before the Court in this second action are Guaranty Trust Company of New York, Junius Parker, George W. Hill, Vincent Riggio, R. J. Boylan, J. B. Harvie and The American Tobacco Company. Re-
6 moved to United States District Court for Southern District of New York by petition of The American Tobacco Company served April 25, 1931, on the ground of diverse citizenship, it being claimed that said company was a citizen of New Jersey; and by petition of defendant Charles A. Penn, served on same date, on the ground of diverse citizenship, it being claimed that said Penn was a citizen of North Carolina. Record filed in United States District Court May 4, 1931. Motion to remand to State Court denied November 7, 1931.

Order consolidating the two actions entered November 7, 1931. Stipulation providing that pleadings and bill of particulars in the second action should serve as pleadings and bill of particulars in the consolidated action approved by Court November 7, 1931. 7

There has been no change in the party plaintiff herein. As appears from the foregoing, the defendants have been changed so that the only defendants now before the Court are Guaranty Trust Company of New York, Junius Parker, George W. Hill, Vincent Riggio, R. J. Boylan, J. B. Harvie, The American Tobacco Company and T. R. Taylor, all of whom have appeared in the consolidated cause.

Amended complaint filed November 30, 1931.

Answer of defendants Hill, Riggio, Harvie, Boylan, The American Tobacco Company and T. R. Taylor filed November 28, 1931. 8

Amended answer of Guaranty Trust Company and Parker filed on or about December 2, 1931.

No question has been referred to a commissioner, master or referee.

None of the defendants has been arrested, nor has any bail been taken or property attached or arrested.

Motion by plaintiff in District Court (1) to strike out separate defenses in answer of defendants Hill et al., (2) for a decree on the pleadings for the relief prayed for in the amended complaint, and (3) in the alternative for an injunction *pendente lite,* heard by Judge Patterson December 24, 1931.

Opinion rendered by Judge Patterson and order and decree entered February 23, 1932, denying plaintiff's motion and dismissing the complaints without prejudice, in the exercise of the Court's discretion. 9

Appeal allowed February 24, 1932.

10 **Notice of Motion.**

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

RICHARD REID ROGERS, Plaintiff, against GUARANTY TRUST COMPANY OF NEW YORK, JUNIUS PARKER, GEORGE W. HILL, C. F. NEILEY, A. C. MOWER, VINCENT RIGGIO, CHARLES A. PENN, 11 J. B. HARVIE, R. J. BOYLAN, C. S. KEENE, J. K. FLETCHER and THE AMERICAN TOBACCO COMPANY, Defendants.	In Equity 59-307. Consolidated Cause.
RICHARD REID ROGERS, Plaintiff, against THE AMERICAN TOBACCO COMPANY and T. R. TAYLOR, Defendants.	

12 PLEASE TAKE NOTICE that at a stated term of this Court for the hearing of motions to be held in the United States Post Office Building in the Borough of Manhattan and City of New York on the 15th day of December, 1931, at 10.30 o'clock in the forenoon or as soon thereafter as counsel can be heard, a motion will be made for the following relief:

1. Upon the amended complaint filed by the plaintiff herein, with the exhibits accompanying same and made a part thereof, the bill of particulars furnished by the plain-

tiff, and the answer of the defendants George W. Hill, Vincent Riggio, J. B. Harvie, R. J. Boylan, T. R. Taylor and The American Tobacco Company to said amended complaint, all of which are on file in the office of the Clerk of this Court: for an order striking out the First, Second, Third and Fourth Separate Defenses of the said answer, upon the ground that they are irrelevant and insufficient and do not constitute legal defenses to the said complaint.

2. Upon all of the pleadings in said suit, to-wit, the aforesaid amended complaint with the exhibits accompanying same and made a part thereof, the aforesaid bill of particulars and the aforesaid answer of the defendants George W. Hill, Vincent Riggio, J. B. Harvie, R. J. Boylan, T. R. Taylor and The American Tobacco Company to said amended complaint, and in addition the amended answer of the defendants Guaranty Trust Company of New York and Junius Parker to said amended complaint, all of which are on file in the office of the Clerk of this Court: for a decree against the defendants Guaranty Trust Company of New York, Junius Parker, George W. Hill, Vincent Riggio, J. B. Harvie, R. J. Boylan, T. R. Taylor and The American Tobacco Company in accordance with the prayer of the aforesaid amended complaint. 14

3. In the alternative to the relief mentioned in paragraph 2 of this notice of motion, if the same be not granted, and upon the aforesaid amended complaint, duly verified, with the exhibits accompanying same and made a part thereof, the aforesaid bill of particulars, duly verified, and the affidavit of Richard Reid Rogers annexed hereto, sworn to on the 9th day of December, 1931: for an interlocutory injunction *pendente lite* against the defendants Guaranty Trust Company of New York, Junius Parker and The American Tobacco Company: (a) enjoining the defendant Junius Parker and the defendant Guaranty Trust Company of New York, its directors, 15

16 *Notice of Motion.*

officers, agents and employees, during the pendency of this suit, from carrying out the program or plan set forth in the said amended complaint for the sale or delivery of any part of the 56,712 shares of common stock B of The American Tobacco Company to the directors, officers, employees or other subscribers as set forth in said amended complaint; (b) enjoining the defendant The American Tobacco Company, its directors, officers, agents and employees, during the pendency of this suit, from recognizing the 56,712 shares of common stock B already issued under said plan or program, or any part thereof, as valid; from transferring any of said stock upon its books; from paying any dividends thereon; from issuing any rights with
17 respect thereto; from in any other respect according the said stock the status of valid outstanding stock of said company; and from issuing any further part of the original 312,768 shares of common stock B of The American Tobacco Company claimed to be available for issue under and pursuant to the so-called Employees' Stock Subscription Plan set forth in said amended complaint; and (c) for such other or further relief in the premises as to the Court may seem just and proper.

Dated: New York, N. Y., December 9, 1931.

RICHARD REID ROGERS,
Plaintiff *in sua persona,*
18 Office & P. O. Address:
74 Trinity Place,
Borough of Manhattan,
City of New York.

To:

CHADBOURNE, STANCHFIELD & LEVY, Esqs.,
Attorneys for defendants George W. Hill, V. Riggio, J. B. Harvie, R. J. Boylan, and The American Tobacco Company,
25 Broadway,
New York City.

WILLIAM M. PARKE,
Attorney for defendant T. R. Taylor,
25 Broadway,
New York City.

20

DAVIS, POLK, WARDWELL, GARDINER & REED, Esqs.,
Attorneys for defendants Guaranty Trust Company of New York and Junius Parker,
15 Broad St.,
New York City.

Affidavit of Richard Reid Rogers in Support of Motion.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

21

[TITLES OF BOTH ACTIONS.]

STATE OF NEW YORK,
COUNTY OF NEW YORK, } ss.:

RICHARD REID ROGERS, being duly sworn, deposes and says that he is the plaintiff in the above-entitled action.

Notwithstanding its immateriality, affiant says that the allegation on information and belief in paragraph XVII

of the joint answer of George W. Hill and others and The American Tobacco Company that he sold 500 shares of old common stock and 1,000 shares of old common stock B, or any other amount, on or about June 25th or 26th, 1930, is not true; but states that on or about that date he transferred from his own name to the name of Eunice T. Rogers, his wife, 1540 shares of common and common stock B which was her property, but which previously for convenience of administration had been left standing in his name, and which she still continues to hold.

Affiant also denies, notwithstanding its immateriality, that he ever solicited any proxies for the annual meeting
23 of the company held on April 1, 1931; but, under the apprehension that some effort might be made by George W. Hill and his associates to approve the enormous salaries, bonuses and gifts which they were receiving, he inserted one advertisement in the New York Herald-Tribune as follows:

> "To the Stockholders of The American Tobacco Company:
>
> "Mr. George W. Hill, president, has addressed a circular to the stockholders of this company, in which he asks them to express their approval of the company's management by sending in their proxies to him and two vice-presidents for the annual meeting to be held in Jersey City at 11 a. m., April 1,
> 24 1931. From a pamphlet enclosed it appears that on the basis of the company's earnings for 1930, Mr. Hill has or will receive in salary and cash bonuses approximately $1,008,000 for that year, and in addition he has allotted to himself, under the Employees' Stock Subscription Plan, the right to buy 13,440 shares of common stock B, now worth approximately $120 a share, at $25 a share, making approximately $1,275,000 additional, or a total of $2,280,000 for the year 1930.

"On the same basis each of the five vice-presidents will have received for 1930 an average of approximately $567,000, or a total of $2,836,000. Legal steps are being taken to test the legality of these transactions in the courts. But in the meantime, I do not know whether the stockholders desire to approve even indirectly these exorbitant payments, whether as salaries or as gifts; or whether they are disposed to approve a trend in corporate management in this country which is or may prove pernicious.

"I advise the stockholders, therefore (whom I am unable to reach in any other way), who do not approve of this policy, not to send in their proxies to Mr. Hill, but either to appear in person or give their proxies to someone who will not vote approval. While I am not personally seeking proxies, I will state that any proxies sent to me will be voted against approval of these salaries, bonuses or gifts. Later proxies will cancel earlier ones."

The foregoing advertisement speaks for itself. As it turned out, no business was transacted at the aforesaid annual meeting except the election of directors for the ensuing year.

RICHARD REID ROGERS.

Sworn to before me this
9th day of December, 1931.

ANDERSON WOODS,
Notary Public, Kings County No. 335.
Certificate filed in N. Y. County No. 395.
(Seal) Commission expires March 30, 1933.

28 **Amended Complaint.**

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

RICHARD REID ROGERS, Plaintiff, against GUARANTY TRUST COMPANY OF NEW YORK, JUNIUS PARKER, GEORGE W. HILL, C. F. NEILEY, A. C. MOWER, VINCENT RIGGIO, CHARLES A. PENN, 29 J. B. HARVIE, R. J. BOYLAN, C. S. KEENE, J. K. FLETCHER and THE AMERICAN TOBACCO COMPANY, Defendants.	In Equity.

The plaintiff, Richard Reid Rogers, who sues on his own behalf and on behalf of all other stockholders of the defendant company similarly situated who choose to come in and contribute to the costs and expenses of this suit, complaining of the defendants herein by the way of amended complaint, respectfully alleges as follows:

1. The American Tobacco Company is a stock corporation organized prior to 1905 under the laws of New Jersey, 30 engaged in the manufacture and sale of tobacco products, licensed and qualified to do business under the laws of this State, and having its principal place of business at 111 Fifth Avenue in this city, where its chief executives have their offices, where its board of directors customarily meets, and where its principal records are kept.

2. The defendant Guaranty Trust Company is a corporation organized and existing under the laws of New York; the defendant Junius Parker is a citizen of New

York and was from December 16, 1925, to May 1, 1929, a director and Chairman of the Board of Directors of the defendant The American Tobacco Company. The other individual defendants herein named are and were citizens of the State of New York, with the exception of Charles A. Penn, who is a citizen of North Carolina, and were directors and officers of the defendant The American Tobacco Company, as follows: George W. Hill, director from April 6, 1921, to date, Vice-President from April 6, 1921, to April 7, 1926, and President from April 7, 1926, to date; Charles A. Penn, director from April 6, 1921, to date, and Vice-President from April 6, 1921, to date; A. C. Mower, director from April 6, 1921, to date, and Vice-President from April 4, 1923, to date; Charles S. Keene, a director from April 6, 1921, to date, and Vice-President from April 6, 1921, to April 4, 1923; J. K. Fletcher, director from January 16, 1929, to date; Charles F. Neiley, director from April 6, 1921, to date, and Vice-President from May 1, 1929, to date; Vincent Riggio, director from April 4, 1928, to date, and Vice-President from May 1, 1929, to date; James B. Harvie, director from August 14, 1929, to date, and Treasurer from April 4, 1928, to date; R. J. Boylan, director from August 14, 1929, to date, and Secretary from April 4, 1928, to date. In addition to such individual defendants, there are and were from 1929 to February 1, 1931, seven other directors of the said company, none of whom are residents of this State and are not at the present time subject to the process of this Court, but who may be joined hereafter as defendants if jurisdiction can be obtained of them. And plaintiff alleges that all of the Board of Directors of The American Tobacco Company were and are employees of that company or of some subsidiary thereof, and were and are, under the terms of the provisions of the so-called program or alleged plan herein referred to, in a position to benefit or participate in the distribution of 312,968 shares of the common stock B of the company, as hereinafter set forth.

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3. The plaintiff is a citizen of New York and the owner and registered owner of 200 shares of the common stock of defendant company acquired in 1916, and 400 shares of the common stock B of said company acquired since 1925.

4. Prior to June 25, 1930, the capital structure of the corporate defendant was as follows: Preferred stock, having a par value of $100, authorized 540,106 shares, outstanding 526,997; common stock, having a par value of $50 a share, authorized 1,000,000, outstanding 804,848; common stock B, having a par value of $50 a share, authorized 2,000,000, outstanding 1,538,660; the common stock B having the same financial status as the common
35 stock, but possessing restricted voting rights. The company at this time also had outstanding gold bonds aggregating $1,087,350. The unissued common stock B was part of an increased issue authorized in 1920.

5. At a special meeting of the Board of Directors held at the above place in this city on June 25, 1930, a program, as it was officially called by the Board of Directors of said company, was devised and approved by the directors, paving the way for the distribution to themselves and to officers and employees of the company of 312,968 shares of the common stock B of the company at a nominal price wholly disproportionate to its market value.

36 6. The said program contemplated the reduction in the par value of the common stock and common stock B of the company from $50 to $25 per share, an increase in the authorized common stock of the company to 2,000,000 shares of $25 par value and of the common stock B to 4,000,000 shares of $25 par value, an issue to all stockholders of two shares of new stock for one share of corresponding old stock; and the setting aside of the aforesaid 312,968 shares of common stock B for distribution to the directors, officers and certain employees, as herein set

forth. There is annexed hereto and made a part hereof, as Exhibit A, the official circular signed by defendant Hill and sent out by the American Tobacco Company to the stockholders in connection with said program.

7. As a condition precedent to submitting to the stockholders of the company for approval any plan for an issue or the sale and purchase of capital stock of the company to any or all of its employees, the Board of Directors of defendant company were required by Chapter 175 of the Laws of the State of New Jersey for the year 1920 to first formulate such plan and pass a resolution declaring that in the opinion of the board the adoption thereof was advisable. At the special meeting of the directors above 38
referred to, the proposed plan, a copy of which is annexed hereto and made a part hereof as Exhibit B, was laid before the board, and a resolution declaring that its adoption was advisable was proposed and voted upon; but said resolution was not adopted by a majority of a quorum legally qualified to vote thereon, nor was a quorum of directors legally qualified to vote upon said resolution present at the meeting; inasmuch as at that time all of the directors present were in fact employees of the company, and by the express provisions of the proposed plan qualified to participate in the distribution of the aforesaid 312,968 shares of the aforesaid new common stock B at $25 a share, when on that very day the old common stock B, convertible into the new on the basis of one for two, 39
sold on the New York Stock Exchange as high as $231.50 a share. And plaintiff avers that all of the directors present at said meeting have subsequently participated in the distribution of said new common stock B at $25 a share, now worth in the market in excess of $125 a share. The plaintiff therefore avers that said resolution was not legally adopted by a majority of a quorum of disinterested directors, and was invalid, void and of no effect; that the subsequent vote of stockholders required by law to be

predicated upon a previous valid resolution of the directors declaring, in their opinion, that the plan was advisable, was likewise void and of no effect; and that the issue of stock thereunder for any purpose or at any price was in turn invalid and void.

8. The stockholders were notified to take action upon the resolution for the modification of the capital structure as aforementioned and the invalid resolution of the Board of Directors, which purported to approve the said employees' stock subscription plan, Exhibit B, at a meeting of the stockholders announced to be held in Jersey City,
41 July 28, 1930. A copy of the notice to the stockholders is attached hereto and made a part hereof as Exhibit C.

9. In the official statement, Exhibit A, sent out by order of the Board of Directors of the defendant company over the signature of George W. Hill, its President, it was said:

> "It is the expectation of your Board of Directors, if the program set forth in the enclosed notice is approved by the Stockholders, to declare an extra dividend of $4. per share on the Common Stock and Common Stock B now outstanding (the old stock), payable simultaneously with such one hundredth consecutive quarterly dividend, and also, commencing with the one hundred first consecutive quarterly
42 dividend, to initiate the regular quarterly dividends on the *newly authorized shares* of Common Stock and Common Stock B at the annual rate of $5. per share."

10. Plaintiff at the time being out of the United States, the proxies for his stock and the stock controlled or represented by him were voted by William Kennedy, who at the said meeting voted said stock against both the resolutions submitted to the stockholders as a part of the

program referred to in the notice of the President, George W. Hill; and at the same time read the following statement:

"1. The split in the stock is unnecessary and serves no useful purpose unless to promote speculation, in itself unwholesome.

"2. There was attached to the notice calling this meeting a statement that the directors, if the stock were increased, would assume the authority to sell a maximum of 312,968 shares to officers and employees, some of whom are themselves directors, at a price as low as $25 a share. If this action should be taken, it might result in a transfer to officers 44
and employees of approximately thirty million dollars of the assets of the stockholders without consideration. Although a vote on this resolution would not, it is believed, legally commit the stockholders to this step, the notice was undoubtedly intended to operate as an estoppel against such stockholders as vote for the resolution. The promise of an extra dividend of $4 is made contingent upon adoption of this resolution, although there is no logical connection between the two. This dividend therefore assumes the form of a bribe to induce stockholders indirectly to approve a proceeding favorable to some of the directors, officers and employees, but costly to the stockholders themselves. 45

"I think it is fair under these circumstances to give notice to the officers and directors of this meeting that the stockholders whom I represent, owning upwards of 3,000 shares, would regard the sale of any considerable amount of the new stock to directors, officers or employees, at a price substantially below its market value, as a waste of corporate assets; and that it is their intention, if any such steps be taken, to seek to hold them personally responsible therefor in the courts."

11. More than two-thirds of the stockholders of all classes present at the meeting voted for said resolutions, and since then the common and common stock B of the company have been increased to 2,000,000 and 4,000,000 shares, respectively, having a par value of $25 each, and two shares of said common stock or common stock B issued or offered respectively to each stockholder for each share of $50 par value similar stock previously held by him, as provided in the first resolution adopted at said stockholders' meeting; the extra dividend promised in the letter of the President of the company if the program referred to therein were approved by the stockholders has
47 been paid; and the 312,968 shares of common stock B has been set aside and distributed in part and made available for distribution in its entirety to the directors, officers and employees of the defendant company, as herein set forth.

12. In the prosecution of the program referred to by the President and set forth above, a meeting of the Board of Directors was held in this city January 28, 1931, after which it was officially announced by the company that in addition to declaring a regular dividend payable March 1, 1931, of $1.25 a share on the new $25 value common stock and common stock B of the company, and an extra dividend of $1 a share on the said stock, the directors had voted at said meeting to sell 56,712 shares of the common
48 stock B, which on that day sold on the New York Stock Exchange at $112 a share, at $25 a share to employees of the company, among whom were all of the officers and directors of the company. The said stock authorized to be so sold to the directors, officers and employees at $25 a share was part of the increased common B capital stock authorized to be issued under the resolution increasing the capital stock of the defendant company, heretofore referred to.

13. On the 30th day of January, 1931, plaintiff addressed and had delivered to the said company a communication as follows, a copy of which was mailed to each of the directors of the said company:

"On condition that the stockholders should approve a so-called plan, whereby it was possible to distribute approximately $30,000,000 in bonuses to officers, directors and employees of the company, the stockholders were promised at a special meeting held July 28, 1930, an extra dividend of $4 a share. I blush to think that any board of directors in this country could be found to resort to a measure so indirect or reprehensible to enrich any class 50
of employees at the expense of the company; and the stock owned or controlled by me was naturally voted against the scheme.

"I am now informed that at a meeting of the directors on Wednesday last, they assumed in pursuance of the said scheme to sell to officers and employees, some of whom no doubt were themselves directors, some 56,000 shares of the capital stock of this company, worth on that day $112 a share, at $25 a share.

"I invite the board's attention to the fact that this action was illegal for the following reasons:

"1. The essential feature of the plan, viz., the wasteful price at which it was proposed to sell the 51
stock to directors, officers and employees was omitted. The actual plan was not therefore submitted to or approved by the stockholders at all.

"2. Under the laws of New Jersey, unless the charter of the company otherwise provides, which is not true in this case, no stock can be issued without offering to each stockholder the right to purchase his proportionate share of the stock at the

price for which it is to be sold. The charter of the company has never been amended so as to cut off this right.

"3. The resolution adopted related exclusively to the authority contained in subdivision 1A of the law of 1920, which authorizes the company to sell stock to employees and to arrange for its payments in instalments; but which nowhere authorizes the directors to donate over three-fourths of its value to employees. In selling stocks to directors and officers of the company at $25 a share, or $87 a share less than its actual worth, the directors are
53 guilty of an actual waste of corporate assets for which in my opinion they have no warrant in law and for which they are personally liable.

"I therefore demand that within twenty days the board of directors cancel and rescind the proposed unlawful distribution of stock, which both under the law and by their own resolution they have the right to do, and return to directors, officers and employees any money they may have paid upon the said stock with six per cent. interest. Second, that they immediately institute action against all members of the board voting for or approving directly or indirectly said resolution, to recover any damages the company may have sustained in consequence thereof.

54 "If not advised to the contrary within twenty days, I shall assume that the directors have refused to comply with this request."

14. The plaintiff says that twenty days have now elapsed since the delivery of said letter to the defendant company, and that the said company and its Board of Directors have declined to comply with the said demand.

15. The plaintiff further says that the program under which the directors are proceeding to distribute the

aforesaid stock of the company to themselves and selected employees of the company at $25 a share never in fact received the approval of the stockholders at the meeting held July 28, 1930; inasmuch as apart from the invalidity of the said plan, Exhibit B, heretofore and hereafter referred to, the said plan set forth a minimum of $25 a share below which the said stock should not be sold and did not authorize or anywhere approve a sale of the said stock at less than its actual or market value. And plaintiff further avers that such was the construction placed upon the said resolution or plan by the defendant George W. Hill, then and now President and a director of the American Tobacco Company, prior to the ineffectual adoption by the stockholders of said resolution, in a communication written by him relative to the proxies of this plaintiff, among others, under date of July 1, 1930, in which the said President stated that "subscriptions under the plan must be at a minimum but by no means or necessity a maximum price of $25 a share." A copy of said letter is annexed hereto and made a part hereof as Exhibit D. And plaintiff avers that the sale of said stock by the directors to or for the benefit of themselves and other officers and employees of the company at $25 a share at a time when it was selling in the market in excess of $112 a share was and is a waste of corporate assets and an unlawful infringement upon the rights of the stockholders of the company. 56

16. The plaintiff further alleges that the said plan, Exhibit B, was illegal, *ultra vires* and void, in that it authorized the Board of Directors of defendant company to offer and allot such stock for subscription to employees of the corporation or its subsidiaries, "by way of additional compensation for services to be rendered," whereas, under the law under which the defendant company was organized, and particularly by reason of Section 1 of Chapter 195 of the Laws of New Jersey of the year 1917, 57

said company's stock could not be lawfully issued for services to be rendered, but only, under any circumstances, "for the amount it actually pays for labor performed."

17. Plaintiff further avers that under the charter of the company, a copy of which is annexed hereto and made a part hereof as Exhibit E, and the laws of New Jersey, special reference being made to Section 124 of the General Corporation Law of that State as added by Section 16 of Chapter 318 of the Laws of 1926, in force as of the time of the aforesaid distribution of stock to the directors and employees of the defendant company, every stockholder of the said company had the right, unless waived by him,
59 according to the number of shares held by him to purchase his pro rata proportion of the stock to be issued within such time and on such terms as might be fixed and determined by the Board of Directors; that plaintiff has never waived the aforesaid right; that the said stock or any part thereof has never been offered him or any stockholders of the company, other than such directors and employees participating in the distribution of stock under the aforesaid program as happened to be stockholders, of whom the plaintiff was not one; that the issue of stock as aforesaid to directors and other employees was in violation of the fundamental and contractual rights of the plaintiff and all other stockholders of the company similarly situated, as expressed by the charter and the laws
60 of New Jersey above referred to; and that the sale of said stock to directors, officers and employees or other parties in violation of the aforesaid preemptive right of the stockholders of said company, and particularly of those stockholders who have never waived the said right, is illegal, void and an unlawful infringement upon the rights of such stockholders.

18. The plaintiff further alleges that the plan, Exhibit B, was illegal, *ultra vires* and void, in that it provided

for a sale to only such employees of the defendant company or its subsidiaries "as may be selected by the President of the company pursuant to authority to be delegated to him by the Board of Directors" and in such amounts and proportions as he might designate; whereas the law under which the plan purported to be issued, provided for the sale to any or all of its employees, and plaintiff alleges that in the exercise of his discretion, the President, with the approval of the directors, selected only a small fraction of the employees, including himself and the other directors, as hereinafter set forth.

19. Plaintiff further alleges that out of the 312,968 shares of common stock B set aside under the terms of 62
the aforesaid abortive and illegal plan, 56,712 shares under date of January 30, 1931, and pursuant to resolutions adopted at a meeting of the Board of Directors of said company held in this city on January 28, 1931, copies of which resolutions are hereto annexed and made a part hereof as Exhibit F, have been issued and delivered to the defendants Guaranty Trust Company and Junius Parker, both residents of this State, with offices in this county, designated as Trustees, and have been purchased by the said Guaranty Trust Company at $25 per share. The said designated Trustees contemporaneously entered into a subscription agreement with numerous employees of the defendant company or its subsidiaries, called participants, among whom are all of the directors of the said company 63
and the individual defendants, parties hereto, whereby they offered for subscription and purchase to each of said participants the aforesaid stock in various amounts at $25 a share, to be paid for at the rate of $1.25 quarterly, the date and rate of payments corresponding with the current ordinary dividends now paid upon such stock, which dividends are required to be applied on the purchase price. Provision is also made for additional payments by each participant. When the stock is fully paid for at $25 per

share, together with interest at six (6) per centum on unpaid balances, by a participant, the stock is to be delivered to such participant; but it is further provided that no stock, whether paid for or not, shall be turned over to any participant prior to December 31, 1931. It is further stated that the right to purchase said stock, having a market value on January 30, 1931, of approximately $112 a share, at $25 a share is by way of additional compensation for services to be rendered by the participant to the defendant company or its subsidiaries to and including December 31, 1931. A copy of said agreement is annexed hereto and made a part hereof as Exhibit G.

65 Plaintiff avers that such sale and disposition of said stock is not only illegal and void for the fundamental reasons heretofore set forth, but is also illegal and void for the following additional reasons particularly applicable to this transaction: *first,* because the resolution of the Board of Directors of the defendant company professing to approve the said transaction was void and of no effect, because not passed by a quorum of disinterested directors; *second,* because the sale to and purchase of the said stock in the first instance by the said Guaranty Trust Company, which is not an employee of the defendant company, is a sale to others than employees, contrary to the very provisions of the alleged plan, Exhibit B; *third,* because among the participants there are included the following who are not employees of the company: Junius Parker, who is no

66 longer an officer or employee, but who is retained at a fixed salary as legislative counsel; Louis Levy, whose law firm is general counsel for the defendant company; and Ivy Lee, who is retained as advertising agent at a fixed annual compensation; *fourth,* because one of the Trustees under the said plan, to wit, the defendant Junius Parker, being a participant in the benefits thereof, was disqualified to act as Trustee; *fifth,* because while the stockholders had the right under a legal plan and for a valid consideration to provide for a sale of stock not subject to the

stockholders' preemptive right heretofore referred to employees through the instrumentality of trustees, they were not required to so provide, but, to the contrary, under the plan, Exhibit B, omitted all reference to trustees and provided for a sale of stock directly to each individual employee; *sixth,* because, under Section 1 of the laws of New Jersey, 1917, Chapter 195, it could not legally issue stock for the consideration of services to be performed, but only "for the amount it actually pays for labor performed." And plaintiff further alleges that the declarations in the various resolutions claimed to have been passed by the Board of Directors and in the said agreement in this paragraph described that the stock, then selling in the open market for $112 a share and now selling for approxi- 68
mately $125 a share, was offered to employees at $25 per share by the way of consideration for services to be performed from January 30th to December 31st of this year, was and is a mere pretext and attempted cover for an illegal act, and in itself a badge of fraud upon the part of the directors approving the same, among whom, on information and belief, are the directors herein joined.

20. And as further facts showing fraud, plaintiff avers that out of the 56,712 shares referred to in the preceding paragraph, there were distributed on the terms therein set forth by defendant Hill, President and director of said company, with the approval of the Board of Directors thereof, 13,440 shares to himself, 8,025 shares to the de- 69
fendant Charles A. Penn, 1,000 shares to the defendant A. C. Mower, 3,000 shares to the defendant C. F. Neiley, 4,000 shares to the defendant Vincent Riggio, 260 shares to the defendant J. B. Harvie, 260 shares to the defendant R. J. Boylan, 260 shares to the defendant J. K. Fletcher, and 400 shares to the defendant Junius Parker; 2,125 shares to the other directors of the defendant The American Tobacco Company; and 23,942 shares to other employees of said company. There is hereto annexed and

made a part hereof, as Exhibit H, a list of the participants in said stock distribution, and the respective allotments to such participants, showing their respective rates of compensation and their respective official connections with the company. But plaintiff alleges that not one single share was offered to any rank and file employee of said company; and plaintiff avers that every director present at the said meeting of the Board of Directors of The American Tobacco Company of January 28, 1931, was at such time designated by the defendant Hill, with the approval of the board, as a qualified participant in a specified amount under the said plan, and has since exercised
71 his subscription privilege; and that each director present voted in rotation on the distribution of stock to all other directors, but was recorded as himself not voting when his own particular distribution was before the board.

21. Plaintiff avers as further facts showing indirection, deceit and suppression of the truth upon the part of the directors, and particularly those directors joined herein who are the President and Vice-Presidents of defendant company, that at the very time when the directors went before the stockholders of the company at the meeting of July 28, 1930, to seek their approval of the plan whereby 312,968 shares of new common stock B of the company, having a then market value of approximately $28,000,000 (as shown in paragraph 7 hereof), and a present market
72 value of approximately $31,298,680 in excess of the $25 a share at which the first batch of 56,712 shares has been allocated and sold as herein set forth, on the ground, as set forth in the circular Exhibit A, that the "employees should be given every encouragement to continue in the company's employ," the employees as a whole and themselves in particular, and especially the President and Vice-Presidents of the company, were receiving the following benefits:

(a) The employees as a whole, in addition to adequate pay and fixed salaries, were and are receiving free medical service at all of the company's factories, and at the New York office—except that in the case of New York employees the company does not pay for medical attendance at the employees' homes—and, in the case of deserving employees drawing a salary of less than $7,500 a year, the cost of hospital service and surgical operations at the company's expense; and, in addition, deserving employees, retired from superannuation or physical incapacity, were being paid, without any previous contributions upon their part or the part of other employees, pensions in various amounts, each pension being considered and determined on its merits—the pension payments at the present time 74 aggregating approximately $160,000 a year.

(b) The defendant Hill, as President of the defendant The American Tobacco Company and of a subsidiary, was receiving fixed annual salaries of $168,000 a year, and in addition was receiving and did receive from said defendant company by virtue of a by-law, known as By-Law XII, claimed to have been adopted by the stockholders March 13, 1912, the legality or effect of which is not admitted, and which is the subject of an independent litigation at the suit of this plaintiff, a profit distribution, in addition to his fixed salaries of $168,000, of $842,507.72 for the year 1930 alone; the defendant Penn, in addition to his fixed salaries as Vice-President and as an officer of a subsidiary company of $98,000 a year, was receiving and did 75 receive under the same by-law a profit distribution for the year 1930 of $505,504.63; the defendant Mower, in addition to a fixed salary as Vice-President of $50,000 a year, was receiving and did receive from said company under the same by-law a profit distribution for the year 1930 of $505,504.63; the defendant Neiley, in addition to a fixed salary as Vice-President of $50,000 a year, was receiving and did receive from said company under the same by-law a profit distribution for the year 1930 of $409,495.25; the

defendant Riggio, in addition to a fixed salary as Vice-President of $50,000 a year, was receiving and did receive from said company under the same by-law a profit distribution for the year 1930 of $409,495.25. A copy of said by-law is annexed hereto and made a part hereof as Exhibit I.

(c) Under a resolution adopted by the directors at a meeting held March 5, 1926, a copy of which is annexed hereto and made a part hereof as Exhibit J, at which meeting there were present the defendants Hill, Penn, Mower, Neiley and Parker, and another director, J. R. Taylor, the defendant company acquired 21,500 shares of
77 its old $50 par value common stock and common stock B at a cost of $116.7291 for the common stock and $115.7291 for the common stock B. This stock was subsequently allotted at cost as follows: to the defendants Hill, 8,000 shares; Mower, 5,000 shares; Penn, 5,000 shares; Neiley, 1,000 shares; Riggio, 1,000 shares; Jesse R. Taylor, another director, 1,000 shares; James B. Harvie and Frank W. Harwood, 250 shares each. The allottees executed their notes, deposited the stock as collateral security thereto and the notes were guaranteed by the defendant company for a period of five years, as appears from Exhibit K hereto annexed and made a part hereof.

(d) On the first day of May, 1929, the defendant Junius Parker resigned as a director and as Chairman of
78 the Board of Directors of the defendant The American Tobacco Company, leaving the defendant George W. Hill, the President, chief executive officer of the company. On May 29, 1929, the defendant Hill, there being no previous resolution of either stockholders or directors authorizing such transaction, directed the purchase of 1100 shares of common and common B stock of The American Tobacco Company through Bamberger Bros., a firm of brokers, members of the Stock Exchange in New York City. The stock was purchased for $185,175 and carried on the books

of the brokers in an account entitled "George W. Hill No. 9." A memorandum of the purchase price was then sent to the Treasurer of The American Tobacco Company, and paid for by the company's check. The stock for convenience of transfer was then transferred into the name of the Secretary of the company, Richard J. Boylan, one of the defendants named herein. Between May 29, 1929, and October 16, 1929, further identical transactions were carried out, varying only in the amount of stock bought and the price paid, with the result that on October 16, 1929, The American Tobacco Company had acquired and paid for 51,750 shares of its own stock, either common stock or common stock B having a par value of $50 a share, equivalent to 103,500 shares of the present outstanding $25 par value stock, at a total cost, less dividends received on the stock of $8,913,937.50. For the purpose of paying for this stock, the company increased its bank loans during this period of time from a total of approximately $5,500,000 to a maximum of approximately $9,000,000. On the 16th day of October, the total cost to the company, plus carrying charges, averaged $172.25 per share. On that day the directors of The American Tobacco Company met, there being present out of a total membership of 17, the defendants Hill, Neiley, Penn, Riggio, Fletcher, Harvie and Boylan, and, in addition, directors C. S. Keene (who resigned shortly thereafter), Thomas R. Taylor and F. W. Harwood, and passed a resolution authorizing the President to purchase common and common stock B of the company in an amount not exceeding 60,000 shares at a price not exceeding $175 a share—it being twice noted in the resolution that the stock had a then market value of $222 a share—and allot the same to "valued employees in accordance with precedents of many years standing established by the late Percival S. Hill." The resolution then provided that the President of the company should allot the said stock at cost, arrived at by adding interest at the rate of 6% annually from date of purchase and deducting

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dividends, "to such officers and/or employees as may in his opinion be deemed to the best interest of the company in promoting and encouraging greater efficiency, more harmonious and enthusiastic co-operation and greater endeavors towards the welfare of the company." A copy of said resolutions and the resolutions therein referred to are annexed hereto and made a part hereof as Exhibits L, M, N, O and P. Although the said resolution L by its own terms apparently related to stock purchases thereafter to be made, it was intended to cover and was thereafter acted upon as applying to the 51,750 shares of common and common stock B purchased between May 29th
83 and October 16th of that year. The defendant Hill thereupon allotted the 51,750 shares as follows: to himself 15,050 shares, to the defendant Penn 10,000 shares, to the defendant Mower 5,000 shares, to the defendant Riggio 5,000 shares, to the defendant Neiley 4,950 shares, to the defendant Harvie 1,000 shares, to the defendant Boylan 1,000 shares, to Thomas R. Taylor, a director present, joined as a defendant in another similar action, 1,000 shares, and to the defendant Fletcher 250 shares. The total allotments to the directors present at the meeting of October 16, 1929, and voting for said resolution, including the defendant Hill, who was recorded as present but not voting, were 39,250 shares out of 51,750. To other directors not present there were allotted 7,250 shares. The total allotted to all directors was 46,500 out of 51,750
84 shares. The remaining 5,250 shares, in lots of from 50 to 250 shares, were allotted by defendant Hill to other officers of the company. A complete list of the allotments is annexed hereto and made a part hereof as Exhibit Q. The various allottees thereupon executed notes to the company, secured by the stock respectively allotted to each, upon which the company charged interest at the rate of 6% until January 1, 1930, 5% until June 1, 1930, and 4% thereafter. After proceedings were instituted by this plaintiff in the action of Rogers v. Taylor, now pending in

the United States District Court by removal proceedings, the various allottees on March 30, 1931, paid off their notes to the company and took up their allotted stock. This operation, carried on with the funds of the company, resulted in a gross profit to the directors and other officials of the company, as indicated by the difference between the cost per share, or $172.25, and the market value the day it was consummated, as stated in the consummating resolution itself (Exhibit L), or $222 a share, of $49.75 per share on 51,750 shares, or a total of $2,574,562.50, and a later profit, at the highest price the stock subsequently sold for, of approximately $4,958,662.50; of which profit approximately 90% was realized by the directors, and ap- 86
proximately 10% by other officers and employees of the company not directors. At the same time that the company was tying up $8,913,937 and increasing its bank loans by approximately $3,500,000, as shown above, the directors were asking the shareholders of the company to contribute $48,822,875 to the company's capital by the purchase from the company of 390,583 shares of old common stock B at $125 a share. The resolution, submitting this increase in capital stock to the shareholders, was passed by the directors in June, 1929; was approved by the stockholders August 28, 1929; and the stock was offered and purchased by the stockholders as of October 1, 1929, for the total sum of $48,822,875.

(e) Under the terms of the By-Law XII of 1912, the 87
President of the company received 2½% and each of the five Vice-Presidents 1½% of the net earnings of the company and its subsidiaries over $11,369,000, varying a few dollars from year to year in conformity with a slight variation in the outstanding amount of preferred stock, the dividend upon which, limited to 6%, is included in the above figure. By Section 2 of By-Law XII (Exhibit I), it was provided in effect that any profit participation which was not paid to a President or Vice-President by

reason of a vacancy should be returned to the general profit account of the company. Pursuant to this provision there was returned to the treasury of the company up to December 31, 1929, from vice-presidential percentages, $1,899,181.89. On May 1, 1929, Charles F. Neiley and Vincent Riggio, defendants herein, were elected Vice-Presidents. At the same time, by resolution of the Board of Directors, a copy of which is annexed hereto and made a part hereof as Exhibit R, it was provided that Vice-Presidents elected on and after that date should receive profits, or contingent compensation as it was called, upon the basis of deducting from future net earnings, not the
89 net earnings after preferred dividends for the year 1910 as provided for by the by-law, or $8,222,245, but upon the basis of deducting from future net profits the earnings of the company "for such other year as may be determined upon by the President of the Company"—this resolution, however, not to apply to Vice-Presidents then holding office, and therefore not applying to the defendant Hill or the defendants Penn and Mower. It was further provided that the difference created through this substitution should revert "into the treasury of the company." Upon the election of the defendants Neiley and Riggio, the defendant Hill as President of the company fixed the deduction to be made before participation to them on the basis of the net profits for the year 1925, which were, after preferred dividends, $14,692,871.12; thus substantially
90 reducing the rate of profit distribution to each of those Vice-Presidents under the terms of By-Law XII, or, as it subsequently worked out in the case of each of them, by $64,006.26 for the year 1929, and $96,009.38 for the year 1930. To the reduction in profit distribution Neiley and Riggio in writing agreed. On the 31st day of July, 1929, while the stock purchases referred to in section (c) of this paragraph were in progress, Thomas R. Taylor was elected a Vice-President of the company. The defendant Hill on that day stated that he had made a similar arrangement

with respect to Taylor as that above referred to with respect to Neiley and Riggio. He further stated that there had thus been effected a considerable saving, or prospective saving, "without there being any reason to anticipate that such saving would result in any diminution of efficiency." On the same day defendant Hill wrote to Taylor notifying him "that until further notice you are not to participate in the contingent compensation provided for in Article XII of the by-laws." That is to say, Taylor was not to participate upon a similar basis to that applied to Neiley and Riggio, as the President had stated to the board would be carried out, but was not to participate on any basis whatsoever. In fact, to the date of this amended 92
complaint Taylor has not participated in any profit sharing under By-Law XII, covering a period of nearly two years. On July 31, 1929, Taylor wrote the defendant Harvie, Treasurer of the company, a letter waiving "in favor of the company" any participation in this contingent compensation "for the whole term of my Vice-Presidency or any re-election to that office, unless it should be otherwise ordered by the Board of Directors." After making the statement to the board of directors with respect to Taylor above referred to, the defendant Hill stated that the Treasurer had made a suggestion which he, Hill, explained, and thereupon the board adopted a resolution, a copy of which with the preliminary statements above referred to is annexed hereto and made a part hereof as Exhibit S, whereby the resolution of May 1, 1929 (Exhibit R), was 93
amended so as to provide that the sum saved by the reduction in the profit participation of Neiley and Riggio, and the complete waiver thereof by Taylor, amounting to approximately $134,361.09 for 1929 and $505,504.63 for 1930, instead of going into the profit account of the company, should be added in the discretion of the President to the stock purchase fund provided under the resolution of February 4, 1914 (Exhibit M). The discretion thereupon conferred upon the President was exercised by him

at once by transferring the sums saved from the above agreements with the Vice-Presidents Neiley, Riggio and Taylor, from the general profit account of the company to the so-called stock purchase fund, and thereafter under date of December 31, 1929, such portion of the fund so increased as 15,050 shares allotted by Hill to himself bore to the total of 51,750 shares purchased, was applied as a credit on Hill's stock purchase note. To all the other directors, including the defendants herein, and other employees to whom said stock was allotted, as shown in Exhibit Q, credits were given in the same proportion; the total amount of the company's funds thus distributed being $262,739.14 for the year 1929, and $698,348.28 for the year 1930.

(f) Under resolutions beginning February 4, 1914, similar in general terms to that resolution (Exhibit M), the company, without authority of law and contrary to the terms of its charter, instituted a stock subscription plan which was renewed from year to year. A copy of a typical plan is hereto annexed and made a part hereof as Exhibit T. These various plans with slight variations were all alike, and in effect provided for a purchase of stock by the company and its resale to any employee who chose to buy it in lots of not more than 4 shares until 1921, 10 shares until 1925 and 20 shares thereafter. Prior to 1921, no employee drawing a salary of over $3,600, and in 1921 over $5,000, was permitted to subscribe. Thereafter the salary limit was removed and from 1921 practically all the directors subscribed for the maximum amount. The stock was sold at an average of about 7% below cost, and a fund of $240,000 a year was contributed by the company to make up the difference between cost and the price at which the stock was sold to the employees. This plan, while actually illegal, was not grossly inequitable in its method of application, inasmuch as it was open to all employees (as many as 1,100 sometimes subscribed), limited

the maximum number of shares that even the highest paid employee could take to 20, and restricted the loss to the company to $240,000 a year. On account of the difficulty of acquiring preferred stock, the plan was not renewed after 1927; the demands upon the company diminished; and on June 27, 1928, the directors by resolution reduced the company's contribution to $120,000 a year; and by another resolution January 1, 1929, to $60,000 a year; this latter amount being deemed sufficient to provide for the company's obligation under all outstanding preferred stock plans. During the period of the stock purchases by the company of the 51,750 shares of common and common stock B from May 30, 1929, to October 16, 1929, heretofore referred to, the directors passed another resolution, the 98
President, Hill, and other defendants Penn, Neiley, Taylor and Boylan, and directors E. Lipscomb, Jr., and C. S. Keene being present, whereby the company's contribution to the stock purchase fund was increased from $5,000 a month to such monthly sum during the remainder of the year as would bring up the aggregate contribution for 1929 to $240,000. A copy of the resolution passed at this meeting is annexed hereto and made a part hereof as Exhibit N. On August 28, 1929, the directors, the defendants Hill, Neiley, Harvie, Riggio, Mower and Boylan and directors T. R. Taylor, F. W. Harwood being present, passed another resolution whereby the sum available from the increased fund was made available "to cover extra compensation in stock even though the valued employee so 99
paid contributed no part of the purchase price." A copy of this resolution is hereto annexed and made a part hereof as Exhibit O. From these operations there resulted for the year 1929, after taking care of old preferred stock plans, the net sum of $206,648.09, and for the year 1930 $219,277.68, which was split among the officers and directors as shown in Exhibit Q in the proportion that their respective stock allotments bore to the total shares dis-

tributed, the denominator for the year 1929 being 51,750 shares, and for the year 1930, owing to the withdrawal of their stock by two distributees, 50,500 shares. From the combined transactions referred to in this and the preceding subsection, it resulted that there was transferred from the assets of the company to the directors and officers shown in Exhibit Q a total sum of $469,387.23 for the year 1929, and $917,625.96 for the year 1930; of which there was credited to defendant Hill by applying the formula heretofore referred to, over and above all fixed salaries and profit participation, the sum of $136,507.71 for the year 1929, and $273,470.76 for the year 1930, the credits in
101 each case being made as of the last day of the year. The other directors, including the defendants herein, were credited with various sums in the same proportions.

22. And the plaintiff avers that prior to February 16, 1931, when he made the application to the Supreme Court of the State of New York for an examination of the defendant, The American Tobacco Company's records, he had no knowledge of the existence of the By-Law XII of 1912, and prior to the examination of the books of the company during the week beginning June 22, 1931, directly following the rejection by the Court of Appeals of New York of leave to appeal from the decisions of the lower courts granting said examination, he had no knowledge of the facts set forth in subsections (c), (d), (e) and (f)
102 of paragraph 21 of this complaint; that no statement with respect to said By-Law XII was ever made in any communication to the stockholders by the company or its officers until after this plaintiff instituted proceedings against the company and certain of its directors in March, 1931; and that no published statement of the said facts set forth in subsections (a) to (f), inclusive, was ever made by the company or any of its officials to the stockholders or anyone else at any time. There is annexed

hereto and made a part hereof a copy of the annual report of the company for the year 1930, marked Exhibit U. No other form of annual report was ever made to the stockholders of the company from the time when in 1916 this plaintiff first became a shareholder in the company to the present time.

23. The amount involved in this suit is more than $3,000, exclusive of costs and interest, and it is not collusive for the purpose of conferring jurisdiction on this Court.

The plaintiff therefore prays (a) that the defendant, The American Tobacco Company, its directors, officers, 104
agents and employees, be enjoined from carrying out the aforesaid illegal and void program or plan for sale of stock of the defendant company to themselves, officers or employees of the said company; (b) that it be required to cancel any sale or agreement under which the said stock is held for the benefit of any director, officer or employee of the said company, to return or procure the return of the said stock to the treasury of the company, and to refund to any employee any actual money, other than dividend money, paid by such employee in payment for said stock, together with six (6) per centum interest thereon; (c) that the 56,712 shares of common stock B already issued as herein described and any other stock that may have been or may be issued under the said illegal plan or program be declared void and of no effect; that 105
the defendant, The American Tobacco Company, its directors, officers, agents and employees, be enjoined from recognizing said stock, or any part thereof, as valid; from transferring the same upon its books; from paying dividends thereon, or from issuing any rights with respect thereto; or from in any other respect according it the status of valid outstanding stock of the company; (d) that the defendant Junius Parker and the defendant

Guaranty Trust Company, its directors, officers, agents and employees, be enjoined from carrying out the aforesaid illegal and void program or plan for sale of stock of the defendant company to directors, officers or employees of the said company; that they be required to cancel any sale or agreement under which the said stock is held for the benefit of any director, officer or employee of the said company, to return or procure the return of the said stock to the treasury of the company, upon such terms as this Court may determine to be just, and to refund to any employee any actual money, other than dividend money, paid by such employee in payment for
107 said stock, together with six (6) per centum interest thereon; (e) that the defendants other than The American Tobacco Company be required to account for and return to the defendant, The American Tobacco Company, any part of the said 312,968 shares of common stock B that they or any of them respectively may receive, and that they be required to account for all costs and damages sustained by the company and its stockholders by reason of the aforesaid illegal acts, including the costs of this suit and reasonable counsel fees to this plaintiff; and (f) that this Court grant and decree such other and further relief to this plaintiff and other stockholders of the defendant, The American Tobacco Company, as under all the facts and circumstances of this case may be deemed just and proper.

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RICHARD REID ROGERS,
Plaintiff *in sua persona*,
Office and P. O. Address,
74 Trinity Place,
Borough of Manhattan,
City of New York.

STATE OF NEW YORK, }
COUNTY OF NEW YORK, } ss.:

RICHARD REID ROGERS, the plaintiff above named, being duly sworn, deposes and says: that he is acquainted with the facts stated in the foregoing complaint; that the same is true to his knowledge, except as to matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true.

RICHARD REID ROGERS.

Sworn to before me this
6th day of July, 1931. 110

ANDERSON WOODS,
Notary Public, Kings County No. 335.
Certificate filed in N. Y. County No. 395.
Commission expires March 30, 1933.

Exhibit A.

THE AMERICAN TOBACCO COMPANY
INCORPORATED
111 Fifth Avenue, New York

OFFICE OF THE PRESIDENT 111

June 25, 1930.

TO THE STOCKHOLDERS:

Your Board of Directors takes pleasure in reporting that, notwithstanding the high record of last year as reflected in the Treasurer's report submitted to you at the last Annual Meeting, your Company's business during the first five months of the current year has surpassed all previous records for corresponding periods. The net

profits for the first five months of this year, as shown by the books of the Company, after allowing for bond interest and preferred dividends, show an increase of more than 100% over the figures for the corresponding period of last year, and the outlook for the remainder of the year 1930 is very encouraging. This situation enables us to take those steps in the interest of our Stockholders which we predicted in 1929.

There is enclosed herewith a copy of a resolution adopted by your Board of Directors declaring the advisability of a split-up of the shares of Common Stock and Common Stock B on the basis of two new shares for each present
113 share, the new shares to be one-half the par value of the old, and each of the new shares of Common Stock to be entitled to one vote; *in order to preserve the relative voting power of the Preferred Stock,* the resolution provides for the increase of such voting power from two votes per share to four votes per share. These changes require an amendment of the Company's certificate of incorporation, and there is enclosed herewith a notice of a special meeting of Stockholders to be held on July 28th, 1930, for the purpose of taking action upon these resolutions and the proposed amendment.

There will also be submitted to the Stockholders at this special meeting a plan for the issuance and sale of shares of Common Stock B of the Company to employees and persons actively engaged in the conduct of the Company's
114 business. A copy of the plan is enclosed. I am certain that every Stockholder will agree that it is to the Company's interest that the organization which has made possible the great success which the Company has enjoyed during the past few years should be given every encouragement to continue in the Company's employ. It is the purpose of this plan, conforming with the policies of many large business enterprises, to offer inducements by way of stock ownership in the Company to the men who have made that success possible, so that the Company and its

Stockholders will have the assurance of their continued services in carrying the business forward with maximum enthusiasm and efficiency.

On September 1, 1930, there will be paid to the Stockholders of The American Tobacco Company *the one hundredth consecutive quarterly dividend* on its shares of Common Stock. It is the expectation of your Board of Directors, if the program set forth in the enclosed notice is approved by the Stockholders, to declare an extra dividend of $4. per share on the Common Stock and Common Stock B now outstanding (the old stock), payable simultaneously with such one hundredth consecutive quarterly dividend, and also, commencing with the one hundred first 116
consecutive quarterly dividend, to initiate the regular quarterly dividends on the *newly authorized shares* of Common Stock and Common Stock B at the annual rate of $5. per share.

There is enclosed herewith a proxy for your signature and return in the event that you are unable to attend the meeting in person. *If you are a holder of Common Stock B, which is ordinarily non-voting, please note particularly that your vote also is required at this meeting.* Your Directors realize that it is impossible for many Stockholders personally to attend the Company's meetings, and that the pressure of personal affairs often causes them to overlook the importance of sending in their proxies promptly. As certain of the steps outlined above require
a two-thirds vote, I urge upon you the importance, whether 117
your holdings be large or small, of indicating your approval of the proposed steps and your support of your Company's management by sending in your proxy as promptly as possible in the stamped addressed envelope which is enclosed.

BY ORDER OF THE BOARD OF DIRECTORS

GEORGE W. HILL
President

118 **Exhibit B.**

EMPLOYEES' STOCK SUBSCRIPTION PLAN

I. Purpose.

The purpose of this Plan is to accord such employees of The American Tobacco Company (herein called the "Corporation") and its subsidiaries, and to those actively engaged in the conduct of its or their business, as may be selected as herein provided, by way of additional compensation for services to be rendered, an opportunity to purchase shares of the stock of the Corporation.

II. The Plan.

119 The Plan is to allot for subscription, in the manner and upon the conditions herein provided, by way of additional compensation for services to be rendered, shares of the unissued Common Stock B of the Corporation which may be authorized by amendment to the Certificate of Incorporation of the Corporation voted at the same meeting of stockholders at which this Plan may be approved, to such of the employees of the Corporation and/or its subsidiaries and those actively engaged in the conduct of its or their business as may be selected as hereinafter set forth; provided, however, that there shall at no time be any issuance of shares under this Plan, when the effect of such issuance would be to increase the total number of shares of Common Stock and Common Stock B issued and outstanding
120 above an aggregate of five million shares.

III. Execution of the Plan.

The Board of Directors may, at such time or times as it may determine, by way of additional compensation for services to be rendered, offer and allot such stock for subscription, to employees of the Corporation, and/or its subsidiaries, and to those actively engaged in the conduct of its or their business, in such amounts and proportions, to such persons, at such prices not less than the par value

of the shares allotted, payable in full or in such installments, and upon such other terms and conditions, all as shall be determined with respect to each offering of stock to each individual pursuant to authority to be granted by the Board of Directors to the President for such purpose.

IV. Rights of Subscriber Prior to Payment.

No stock shall be delivered until such stock has been fully paid for. The Board of Directors, however, may provide that subsequent to subscription for said stock and prior to the time the full subscription price has been paid, the subscribers shall possess such voting (if any) and 122
other rights pertaining thereto, including the right to receive dividends thereon and to subscribe to any new issue of stock by the Corporation, that may be permitted to other holders of Common Stock B of the Corporation. Any and all payments accruing to any such subscriber, by way of dividend or otherwise, prior to the full payment for his stock shall be credited to the subscriber on account of the payments agreed to be made by him in the purchase of said stock, and shall not be paid directly to such subscriber until full payment for his stock has been made.

V. General Conditions.

The Board of Directors may attach to each offering of stock such detailed conditions governing the cancellation 123
and withdrawal of subscriptions and refund of payments and the handling of the same in case of death, disability or pensioning of employees, temporary suspension of employment, permanent discharge or leaving service, or providing for other special situations, in such manner as it shall deem reasonable and appropriate and best calculated to effectuate the purposes of this Plan; provided that in no event shall any amounts paid in be forfeited; and in

case of cancellation or withdrawal, all such amounts shall be returned with interest at such rate, not to exceed Six Per Cent. (6%) per annum, as the Board of Directors may determine. No employee or person actively engaged in the conduct of the business of the Corporation, or its subsidiaries, shall be deemed ineligible to the benefits of the Plan by reason of his being also a director of the Corporation or of any of its subsidiaries or of holding any office therein.

VI. Recall or Amendment.

This Plan may be recalled, abolished, revised, amended,
125 altered or changed, as provided in Section 3 of Chapter 175 of the Laws of the State of New Jersey for the year 1920.

Exhibit C.

NOTICE OF SPECIAL MEETING OF
STOCKHOLDERS OF
THE AMERICAN TOBACCO COMPANY
Incorporated

No. 75 Montgomery Street,
Jersey City, N. J.

126

June 25th, 1930.

To the Holders of Preferred Stock, Common Stock and Common Stock B:

Notice is hereby given that a Special Meeting of the Stockholders of The American Tobacco Company will be held at the principal office of the Company, No. 75 Montgomery Street, on July 28th, 1930, at 11 o'clock A. M., for the following purposes:

Exhibit C to Amended Complaint. 127

1. To take action upon a resolution adopted by the Board of Directors at a special duly convened meeting thereof, held on June 25th, 1930, declaring the advisability of altering and changing the presently authorized capital stock of the Company, including those shares now issued and those not now issued, and directing the submission to the Stockholders of said resolution, and of an amendment to the Company's Certificate of Incorporation to effect such alterations and changes; a copy of which resolution and proposed amendment is enclosed herewith.

2. To take action upon resolutions adopted by the Board of Directors at such special duly convened meeting thereof held on June 25th, 1930, declaring the advisability, 128
and directing the submission to the Stockholders of the Company, including the holders of shares of Common Stock B, of a plan for the issuance and sale of shares of its Common Stock B to employees and those actively engaged in the conduct of its business, by way of compensation for services to be rendered; a copy of which plan is enclosed herewith.

3. To transact such other business as may properly come before said meeting.

The stock transfer books will not close, but stockholders to be entitled to vote must be of record at the close of business on July 7th, 1930.

129

RICHARD J. BOYLAN
Secretary

130 *Exhibit C to Amended Complaint.*

RESOLUTION OF BOARD OF DIRECTORS ADOPTED JUNE 25, 1930

RESOLVED, that this Board of Directors deems and hereby declares it to be advisable that the presently authorized Capital Stock of this Company, consisting of $204,010,600, divided into 540,106 shares of Preferred Stock of the par value of $100 each entitled to two votes for each share, 1,000,000 shares of Common Stock of the par value of $50 each entitled to one vote for each share, and 2,000,000 shares of Common Stock B of the par value of $50 each without voting rights, be changed, and the number of
131 shares thereof be increased, in the following particulars and manner:

(a) by increasing the authorized number of shares of Common Stock to 2,000,000 shares, and the authorized number of shares of Common Stock B to 4,000,000 shares;

(b) by changing the par value of the Common Stock to $25 per share, and changing the par value of the Common Stock B to $25 per share;

(c) by changing each outstanding share of the present Common Stock into two shares of the Common Stock so to be authorized, and changing each outstanding share of the present Common Stock B into
132 two shares of the Common Stock B so to be authorized;

(d) by readjusting the voting rights of the Preferred Stock so that such rights shall be increased from two to four votes per share;

and, in conformity with and to enable giving effect to the foregoing, that the charter or agreement and act of merger or consolidation of this Company be altered and amended by changing Article IV thereof, so that after such change

the authorized capital stock of the Company shall be as therein stated and such Article shall read as follows:

ARTICLE IV.—The capital stock of the said merged Company is $204,010,600. Five Hundred Forty Thousand One Hundred and Six (540,106) shares shall be Preferred Stock of the par value of $100 each. Two Million (2,000,000) shares shall be Common Stock of the par value of $25 each, and Four Million (4,000,000) shares shall be Common Stock B of the par value of $25 each. The rights of the holders of the said Preferred Stock, Common Stock and Common Stock B, respectively, shall be as follows: The holders of the Preferred Stock shall be entitled to four votes 134
for each share of the par value of $100 held by them, and the holders of the Common Stock shall be entitled to one vote for each share of the par value of $25 held by them, but the holders of Common Stock B shall be entitled to no voting rights. The holders of the Preferred Stock shall be entitled to receive out of the surplus or out of the net profits, and the merged corporation shall be bound to pay thereon as and when declared by the Board of Directors, a dividend at the rate of, but never exceeding, six per centum per annum, cumulative, from and after the 1st day of October, 1904, payable yearly, half yearly, or quarterly, before any dividend shall be set apart or paid on the Common Stock or Common Stock B; provided, 135
however, that when all accrued dividends on the Preferred Stock have been paid, the Directors shall, if in their judgment the surplus or the net profits, after deducting the amount of dividends to accrue on the Preferred Stock during the current year, shall be sufficient for such purpose, have power in their discretion to declare and pay a dividend, or dividends, on the Common Stock and Common Stock B. The Common Stock and Common Stock B, with respect to each

share of either outstanding, shall have equal rights in the matter of dividends. In case of liquidation, or dissolution, or distribution of assets of the said merged corporation, the holders of Preferred Stock shall be paid the par amount of their Preferred shares and the amount of dividends accumulated and unpaid before any amount shall be payable or paid to the holders of the Common Stock or the Common Stock B; the balance of the assets of said merged corporation shall be divided ratably among the holders of the Common Stock and the Common Stock B, share and share alike, without distinction between shares of the
137 Common Stock and the Common Stock B.

that the foregoing changes, alterations and amendments be effected simultaneously; that, in the event such changes, alterations and amendments shall be made effective, the proper officers of this Company be and they hereby are authorized and directed forthwith thereafter to issue or cause to be issued certificates of stock, in exchange for outstanding certificates for the presently authorized stock, in accordance with and upon the basis hereinbefore set forth, and to fix the time, place and conditions under which such exchange may be made; and that a special meeting of the stockholders of this Company, to take action, among other things, on the foregoing changes, alterations and amendments, be and it hereby is called to be held at the
138 principal office of this Company in the State of New Jersey, at No. 75 Montgomery Street, in Jersey City, County of Hudson, on July 28, 1930, at 11 o'clock in the forenoon, of which meeting notice shall be given as is provided by the By-Laws of the Company, and which shall be accompanied by a copy of this resolution.

EMPLOYEES' STOCK SUBSCRIPTION PLAN

I. Purpose

The purpose of this Plan is to accord to such employees of The American Tobacco Company (herein called the "Corporation") and its subsidiaries, and to those actively engaged in the conduct of its or their business, as may be selected as herein provided, by way of additional compensation for services to be rendered, an opportunity to purchase shares of the stock of the Corporation.

II. The Plan

The Plan is to allot for subscription, in the manner and 140
upon the conditions herein provided, by way of additional compensation for services to be rendered, shares of the unissued Common Stock B of the Corporation which may be authorized by amendment to the Certificate of Incorporation of the Corporation voted at the same meeting of stockholders at which this Plan may be approved, to such of the employees of the Corporation and/or its subsidiaries and those actively engaged in the conduct of its or their business as may be selected as hereinafter set forth; provided, however, that there shall at no time be any issuance of shares under this Plan, when the effect of such issuance would be to increase the total number of shares of Common Stock and Common Stock B issued and outstanding above an aggregate of five million shares.

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III. Execution of the Plan

The Board of Directors may, at such time or times as it may determine, by way of additional compensation for services to be rendered, offer and allot such stock for subscription, to employees of the Corporation, and/or its subsidiaries, and to those actively engaged in the conduct of its or their business, in such amounts and proportions, to such persons, at such prices not less than the par value of

the shares allotted, payable in full or in such installments, and upon such other terms and conditions, all as shall be determined with respect to each offering of stock to each individual pursuant to authority to be granted by the Board of Directors to the President for such purpose.

IV. Rights of Subscriber Prior to Payment

No stock shall be delivered until such stock has been fully paid for. The Board of Directors, however, may provide that subsequent to subscription for said stock and prior to the time the full subscription price has been paid, the subscribers shall possess such voting (if any) and
143 other rights pertaining thereto, including the right to receive dividends thereon and to subscribe to any new issue of stock by the Corporation, that may be permitted to other holders of Common Stock B of the Corporation. Any and all payments accruing to any such subscriber, by way of dividend or otherwise, prior to the full payment for his stock shall be credited to the subscriber on account of the payments agreed to be made by him in the purchase of said stock, and shall not be paid directly to such subscriber until full payment for his stock has been made.

V. General Conditions

The Board of Directors may attach to each offering of stock such detailed conditions governing the cancellation
144 and withdrawal of subscriptions and refund of payments and the handling of the same in case of death, disability or pensioning of employees, temporary suspension of employment, permanent discharge or leaving service, or providing for other special situations, in such manner as it shall deem reasonable and appropriate and best calculated to effectuate the purposes of this Plan; provided that in no event shall any amounts paid in be forfeited; and in case of cancellation or withdrawal, all such amounts shall be

returned with interest at such rate, not to exceed Six Per Cent. (6%) per annum, as the Board of Directors may determine. No employee or person actively engaged in the conduct of the business of the Corporation, or its subsidiaries, shall be deemed ineligible to the benefits of the Plan by reason of his being also a director of the Corporation or of any of its subsidiaries or of holding any office therein.

VI. Recall or Amendment

This Plan may be recalled, abolished, revised, amended, altered or changed, as provided in Section 3 of Chapter 175 of the Laws of the State of New Jersey for the year 1920. 146

Exhibit D.

THE AMERICAN TOBACCO COMPANY
111 Fifth Avenue
New York.

Office of the President.

July 1, 1930.

Mr. Evan Shelby,
74 Trinity Place,
New York City.

147

Dear Mr. Shelby:

I acknowledge your letter of June 28th addressed to the Company, revoking the proxy you had previously sent us for the Roshel Securities Company and Mr. Richard Reid Rogers.

I am sorry that the provisions of the plan were not clear to you, and conveyed the impression that it would "enable several million shares to be sold at the discretion of the

148 *Exhibit D to Amended Complaint.*

Directors." I assume that you overlooked the last sentence of paragraph II, which provides that

> "there shall at no time be any issuance of shares under this plan, when the effect of such issuance would be to increase the total number of shares of Common Stock and Common Stock B issued and outstanding above an aggregate of five million shares."

The total number of shares of the present Common and Common B stock outstanding is 2,343,516. After the 2 for 1 split-up, the total number of shares of Common and Common B outstanding will be twice this number, or
149 4,687,032. No shares may be issued under the plan to increase this total beyond an aggregate of 5,000,000 shares, which means that the maximum number of shares which could possibly be issued under the plan is 312,968 shares of the new stock, or about 6⅔% of the total number of shares of Common and Common B stock which will be outstanding after the split-up. Subscriptions under the plan must be at a minimum but by no means or necessity a maximum price of $25.00 a share.

I trust that in the light of this explanation you and Mr. Rogers will see fit to reconsider your opinion, and I am taking the liberty of enclosing two proxies.

Very truly yours,

150

(Sgd.) GEORGE W. HILL
President.

MVS
(Enclosures)

Exhibit E.

151

AGREEMENT AND BY-LAWS

1904–1931

AGREEMENT

AN AGREEMENT made and entered into this ninth day of September, in the year nineteen hundred and four, between THE AMERICAN TOBACCO COMPANY, a corporation of the State of New Jersey, by its directors; CONSOLIDATED TOBACCO COMPANY, a corporation of said State of New Jersey, by its directors; and CONTINENTAL TOBACCO COMPANY, a corporation of said State of New Jersey, by its directors:

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WHEREAS, the principal and registered office of each of said corporations in the State of New Jersey is at No. 104 First Street, in the City of Jersey City, County of Hudson, and C. A. Hopman is the agent therein and in charge thereof, upon whom process against each of said corporations may be served within said State; and

WHEREAS, said The American Tobacco Company was organized pursuant to the provisions of an act of the Legislature of the State of New Jersey, entitled "An Act Concerning Corporations," approved April 7, 1875, and the several supplements thereto and acts amendatory thereof; and the said Consolidated Tobacco Company and Continental Tobacco Company were organized pursuant to the provisions of an act of the Legislature of the State of New Jersey, entitled "An Act Concerning Corporations (Revision of 1896)," and the several supplements thereto and acts amendatory thereof; and all of said Corporations were organized for the purpose of carrying on business of a similar nature, to wit: the manufacture and sale of tobacco and the products thereof; and

153

154 *Exhibit E to Amended Complaint.*

WHEREAS, the respective Boards of Directors of the said corporations deem it advisable, for the purpose of greater efficiency and economy of management as well as for the general welfare of the said corporations, to merge and consolidate them under and pursuant to the provisions of said act entitled "An Act Concerning Corporations (Revision of 1896)," and the several supplements thereto and acts amendatory thereof;

NOW, THEREFORE, in consideration of the premises and of the mutual agreements, covenants, provisions and grants herein contained, it is hereby agreed by and between the said parties hereto, as follows:

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ARTICLE I.—The said The American Tobacco Company, the said Consolidated Tobacco Company, and the said Continental Tobacco Company, are hereby consolidated into a single corporation, under the name of "THE AMERICAN TOBACCO COMPANY" (hereinafter called the "merged corporation").

ARTICLE II.—The said merged corporation, in addition to the powers conferred by Section 1 of the Act Concerning Corporations (Revision of 1896), shall have the powers herein set out, and said merged corporation shall be subject to the limitations on said powers herein set out, to wit:

156 To dry, and cure, leaf tobacco, and to buy, manufacture, sell and otherwise deal in tobacco and the products of tobacco in any and all forms; to construct or otherwise acquire and hold, own, maintain and operate warehouses, factories, offices and other buildings, structures and appliances for the drying, curing, storing, manufacture, sale and distribution of tobacco and its products; to guarantee dividends on any shares of the capital stock of any corporation in which said merged corporation has an interest as stockholder, and to indorse or otherwise guarantee the

principal and interest, or either, of any bonds, securities or other evidence of indebtedness created by any corporation in which said merged corporation has such an interest, provided that authority for any such indorsement or guaranty be first given by resolution adopted by vote of at least two-thirds of the whole Board of Directors of said merged corporation; to carry on any business operations deemed by said merged corporation to be necessary or advisable in connection with any of the objects of its incorporation or in furtherance of any thereof, or tending to increase the value of its property or stock; but nothing herein set forth is to be construed to authorize the formation hereby of an insurance, safe 158
deposit or trust company, banking corporation or savings bank or corporation deemed to possess any of the powers prohibited to corporations formed under the statutory provisions aforesaid; to conduct business in all other States, Territories, Possessions and Dependencies of the United States of America, and in all foreign countries, and to have one or more offices out of the State of New Jersey, and to hold, purchase, mortgage and convey real and personal property out of said State as well as therein; the said merged corporation shall have power to purchase or otherwise acquire and hold, sell, assign, transfer, mortgage, pledge or otherwise dispose of the shares of the capital stock or of any bonds, securities or other evidences of indebtedness created by any other corporation or corporations of this or any other State or government, and 159
to issue its own obligations in payment or in exchange therefor, or for any purpose of its incorporation, and to secure such obligations by pledge or mortgage under deed of trust or otherwise of the shares of capital stock or bonds, securities or other evidences of indebtedness so acquired, or of any property of the corporation. The power to make and alter by-laws of said merged corporation is conferred upon the directors. The directors

of said merged corporation may hold their meetings and have an office and keep the books of the corporation (except the stock and transfer books) in the City of New York or elsewhere outside of the State of New Jersey. The directors of said merged corporation shall have the power to fix and determine from time to time and to vary the sum to be reserved, over and above its capital stock paid in, as a working capital, before declaring any dividends among its stockholders, and to fix the time of declaring and paying any dividend, and the amount of any dividend shall be determined by the directors, unless otherwise provided by the by-laws of the corporation; and to
161 direct and determine the use and disposition of any surplus or net profits or earnings, over and above the capital stock paid in. All sums so reserved may be applied from time to time to the acquisition of property as the directors shall from time to time determine, and neither the property so acquired nor any of its capital stock held by the corporation shall be regarded as accumulated profits, for the purpose of declaration or payment of dividends, unless otherwise determined by the directors. In case of any increase in the number of the directors of said merged corporation, pursuant to its by-laws, which may provide for such increase by vote of the directors, vacancies in the board shall be deemed to be thereby created which the existing directors shall have the power to fill until the next election by stockholders, or until successors shall
162 be otherwise chosen. The by-laws of said merged corporation may prescribe the number necessary to constitute a quorum of the directors, which may be less than a majority of the directors. No period is limited for the duration of said corporation, but its existence shall be perpetual.

ARTICLE III.—The Board of Directors of said merged corporation shall be twenty-eight in number, and the names

and places of residence of the first directors and officers thereof, who shall hold office until their successors are chosen or appointed as provided by the by-laws of said merged corporation, are as follows:

Directors

George Arents.....104 First Street, Jersey City, N. J.
Anthony N. Brady.....104 First Street, Jersey City, N. J.
Paul Brown.....104 First Street, Jersey City, N. J.
John B. Cobb.....104 First Street, Jersey City, N. J.
Thomas Dolan.....104 First Street, Jersey City, N. J.
Benjamin N. Duke.....104 First Street, Jersey City, N. J.
James B. Duke.....104 First Street, Jersey City, N. J.
Caleb C. Dula.....104 First Street, Jersey City, N. J.
Robert B. Dula.....104 First Street, Jersey City, N. J. 164
Charles E. Halliwell....104 First Street, Jersey City, N. J.
William R. Harris.....104 First Street, Jersey City, N. J.
George A. Helme.....104 First Street, Jersey City, N. J.
Percival S. Hill.....104 First Street, Jersey City, N. J.
Herbert D. Kingsbury..104 First Street, Jersey City, N. J.
Pierre Lorillard.....104 First Street, Jersey City, N. J.
Thomas J. Maloney....104 First Street, Jersey City, N. J.
William H. McAlister..104 First Street, Jersey City, N. J.
Rufus L. Patterson....104 First Street, Jersey City, N. J.
Oliver H. Payne.....104 First Street, Jersey City, N. J.
Frank H. Ray.....104 First Street, Jersey City, N. J.
Thomas F. Ryan.....104 First Street, Jersey City, N. J.
Grant B. Schley.....104 First Street, Jersey City, N. J.
Robert A. C. Smith....104 First Street, Jersey City, N. J.
Robert K. Smith.....104 First Street, Jersey City, N. J.
Charles N. Strotz.....104 First Street, Jersey City, N. J.
George W. Watts.....104 First Street, Jersey City, N. J. 165
Harry Weissinger.....104 First Street, Jersey City, N. J.
Peter A. B. Widener...104 First Street, Jersey City, N. J.

Exhibit E to Amended Complaint.

Officers

President.....James B. Duke
104 First Street, Jersey City, N. J.

Vice-President.....John B. Cobb
104 First Street, Jersey City, N. J.

Vice-President.....Caleb C. Dula
104 First Street, Jersey City, N. J.

Vice-President.....Charles E. Halliwell
104 First Street, Jersey City, N. J.

Vice-President.....William R. Harris
104 First Street, Jersey City, N. J.

Vice-President.....Percival S. Hill
104 First Street, Jersey City, N. J.

Secretary.....William H. McAlister
104 First Street, Jersey City, N. J.

Assistant Secretary.....Josiah T. Wilcox
104 First Street, Jersey City, N. J.

Assistant Secretary.....Charles K. Faucette
104 First Street, Jersey City, N. J.

Treasurer.....John M. W Hicks
104 First Street, Jersey City, N. J.

As Amended
January 8, 1912
March 19, 1917
January 7, 1918
September 16, 1920
November 26, 1924
September 3, 1930

ARTICLE IV.—The capital stock of the said merged Company is $204,010,600. Five Hundred Forty Thousand, One Hundred and Six (540,106) shares shall be Preferred Stock of the par value of $100 each. Two Million (2,000,000) shares shall be Common Stock of the par value of $25 each, and Four Million (4,000,000) shares shall be Common Stock B of the par value of $25 each. The rights of the holders of the said Preferred Stock, Common Stock and Common Stock B, respectively, shall be as follows: The holders of the Preferred Stock shall be entitled to four votes for each share of the par value of $100 held by them, and the holders of the Common Stock shall be entitled to one vote for each share of the par value of $25 held by them, but the holders of Common Stock B

shall be entitled to no voting rights. The holders of the Preferred Stock shall be entitled to receive out of the surplus or out of the net profits, and the merged corporation shall be bound to pay thereon as and when declared by the Board of Directors, a dividend at the rate of, but never exceeding, six per centum per annum, cumulative, from and after the 1st day of October 1904, payable yearly, half yearly, or quarterly, before any dividend shall be set apart or paid on the Common Stock or Common Stock B; provided, however, that when all accrued dividends on the Preferred Stock have been paid, the Directors shall, if in their judgment the surplus or the net profits, after deducting the amount of dividends to accrue on the 170
Preferred Stock during the current year, shall be sufficient for such purpose, have power in their discretion to declare and pay a dividend, or dividends, on the Common Stock and Common Stock B. The Common Stock and Common Stock B, with respect to each share of either outstanding, shall have equal rights in the matter of dividends. In case of liquidation, or dissolution, or distribution of assets of the said merged corporation, the holders of Preferred Stock shall be paid the par amount of their Preferred shares and the amount of dividends accumulated and unpaid before any amount shall be payable or paid to the holders of the Common Stock or the Common Stock B; the balance of the assets of said merged corporation shall be divided ratably among the holders of the Common Stock and the Common Stock B, share and share alike, without 171
distinction between shares of the Common Stock and the Common Stock B.

ARTICLE V.—The said corporations are merged and consolidated upon the understanding and agreement that the present indebtedness of each of said corporations shall be assumed in full by the said merged corporation.

ARTICLE VI.—All property, real, personal and mixed, of the said corporations, parties hereto, shall vest in the said merged corporation immediately upon the adoption of this agreement by the stockholders of the said corporation, as provided by the provisions of the said act entitled "An Act Concerning Corporations (Revision of 1896)" and the several supplements thereto and acts amendatory thereof; but if the said merged corporation shall deem or be advised that any further assignments, assurances in the law, or things are necessary or desirable to vest the title to such property in the said merged corporation, the said corporations parties hereto shall execute and do all such
173 assignments, assurances in the law, and things necessary to vest title to such property in said merged corporation, and otherwise to carry out the purposes of this agreement.

ARTICLE VII.—The capital stock of each of the said corporations parties hereto shall be converted into the common stock, the preferred stock or the obligations of said merged corporation, and the common stock, preferred stock and obligations of said merged corporation shall be apportioned among the stockholders of the said corporations, parties hereto, according to the shares held by the respective stockholders of said corporations, and shall be delivered to them upon the surrender of their certificates of stock, as follows:

There shall be apportioned to each of the holders of
174 the eight per cent. preferred non-cumulative stock of the said The American Tobacco Company, party hereto, for each share of said preferred stock of the par value of $100 held by him, the obligation or bond of the said merged corporation of one hundred and thirty-three dollars, thirty-three and one-third cents ($133.33⅓) in gold coin of the United States of the present standard of weight and fineness, due and payable on the first day of October, 1944, at the office or agency of the said merged corporation in

the City of New York, with interest thereon from October 1, 1904, at the rate of six (6%) per centum per annum, said interest to be payable to the holder of such bond or obligation, or to the holder of a coupon representing such interest, at said office or agency in like gold coin, semi-annually on the first days of April and October in each year. Said bonds shall be issued in such denominations as the merged corporation shall see fit, and they shall along with the bonds provided for in the next paragraph hereof constitute a first charge upon the income and property of the merged corporation. There shall also be paid to the holders of said preferred stock of said The American Tobacco Company, party hereto, in lieu of dividend, an amount in cash equal to two dollars for each 176
share of said preferred stock held by him.

There shall be apportioned to each of the holders of the seven per cent. non-cumulative preferred stock of said Continental Tobacco Company, party hereto, for each share of said preferred stock of the par value of $100 held by him, the obligation or bond of said merged corporation for one hundred and sixteen dollars, sixty-six and two-thirds cents ($116.66⅔) in gold coin of the United States of the present standard of weight and fineness, due and payable on the first day of October, 1944, at the office or agency of the said merged corporation, in the City of New York, with interest thereon from October 1, 1904, at the rate of six (6%) per centum per annum, said interest to be payable to the holder of such bond or obligation, or to 177
the holder of a coupon representing such interest, at said office or agency in like gold coin, semi-annually, on the first days of April and October in each year. Said bonds shall be issued in such denominations as the merged corporation shall see fit, and they shall, along with the bonds provided for in the next preceding paragraph, constitute a first charge upon the income and property of the merged corporation. The holders of the said preferred stock of

said Continental Tobacco Company, party hereto, shall also be entitled to receive and enjoy the dividend of one and three-quarters (1¾%) per centum already declared on said preferred stock payable October 3, 1904.

There shall be apportioned to each of the holders of the common stock of said The American Tobacco Company, party hereto, for each two shares of said common stock of the par value of $50 each held by him, one share of the common stock of said merged corporation.

There shall be apportioned to each of the holders of the common stock of said Continental Tobacco Company, party hereto, for each share of said common stock of
179 the par value of $100 held by him, one share of the common stock of the said merged corporation.

There shall be apportioned to each holder of the stock of said Consolidated Tobacco Company, party hereto, for each share of said stock of the par value of $100 held by him, one share of the common stock of said merged corporation.

By the act of merger the stocks of all the companies parties hereto held by any of the companies parties hereto shall stand and be canceled.

The preferred stock of the merged corporation herein provided for, may be issued for the redemption and retirement at par of debts that by the act of merger become the debts of said merged corporation, and such preferred stock shall be issued only for such redemption or at par
180 for cash to be used in such redemption.

ARTICLE VIII.—The Morton Trust Company of the City of New York is hereby appointed the Transfer Agent of the stock and obligations of the said merged corporation in the City of New York, and the Farmers' Loan and Trust Company, of the City of New York, is hereby appointed Registrar of the stock of said merged corporation; and any stockholder of any of the said corporations parties

hereto, upon presenting to the said Transfer Agent his certificate of stock and surrendering the same to be canceled, shall be entitled to receive a certificate for the proper number of shares of the capital stock of said merged corporation, or to the bond or obligation of said merged corporation, pursuant to Article VII. of this agreement.

ARTICLE IX.—The said merged corporation shall pay all expenses of consolidation and all preliminary expenses, including legal expenses.

ARTICLE X.—The principal and registered office of said merged corporation in the State of New Jersey is at No. 104 First Street, City of Jersey City, County of Hudson, 182 and C. A. Hopman is the agent therein and in charge thereof, upon whom process against said merged corporation within the State of New Jersey may be served.

IN WITNESS WHEREOF, the said parties to this agreement have in pursuance of a resolution passed by the Board of Directors of each of the said corporations, at a regular meeting of the Board of Directors of each of said corporations, at which a quorum was present, caused the respective corporate seals of said corporations to be hereto affixed and these presents to be signed by their respective Presidents or First Vice-Presidents and attested by their respective Secretaries all duly authorized thereto, the day and year first above written. 183

THE AMERICAN TOBACCO COMPANY,

[SEAL.] By PERCIVAL S. HILL,
First Vice-President.

Attest:

CHARLES N. STROTZ,
Secretary.

184 *Exhibit E to Amended Complaint.*

CONSOLIDATED TOBACCO COMPANY,
[SEAL.] By JAMES B. DUKE,
President.

Attest:

CHARLES S. KEENE,
Secretary.

CONTINENTAL TOBACCO COMPANY,
[SEAL.] By CHARLES E. HALLIWELL,
First Vice-President.

185 Attest:

WILLIAM H. MCALISTER,
Secretary.

STATE OF NEW JERSEY, }
COUNTY OF HUDSON. } ss.:

I, CHARLES N. STROTZ, Secretary of The American Tobacco Company, a corporation organized and doing business pursuant to the provisions of an act of the legislature of the State of New Jersey, entitled "An Act Concerning Corporations," approved April 7, 1875, and the several supplements thereto and acts amendatory thereof;
186 DO HEREBY CERTIFY in accordance with the provisions of Section 105 of "An Act Concerning Corporations (Revision of 1896)":

1. That the foregoing agreement for the merger and consolidation of said corporation and the Continental Tobacco Company and Consolidated Tobacco Company was made by the directors of said The American Tobacco Company at a duly convened meeting called for the purpose.

2. That the said agreement was submitted to the stockholders of said The American Tobacco Company at a meeting thereof held September 30, 1904, called for the purpose of taking the same into consideration, of which meeting twenty days' notice of the time, place and object thereof was mailed to the last known post-office address of each of said stockholders.

3. That the said agreement was considered by the stockholders at said meeting, and a vote of the stockholders was taken by ballot for the adoption or rejection of said agreement, and that stockholders owning more than two-thirds of the shares of the capital stock of said The American Tobacco Company voted in favor of the adoption of said agreement. 188

4. That the meeting of stockholders of The American Tobacco Company and the said vote by ballot upon the adoption of said agreement, were held and taken separately from the meetings of stockholders and votes of the said Continental Tobacco Company and Consolidated Tobacco Company.

5. That the principal office of said The American Tobacco Company in the State of New Jersey is at No. 104 First Street, Jersey City, and C. A. Hopman is the agent therein and in charge thereof, upon whom process against the Company may be served. 189

IN WITNESS WHEREOF, I have hereunto signed my name as Secretary, and affixed the seal of the said The American Tobacco Company, this 19th day of October, 1904.

CHARLES N. STROTZ,
Secretary.

[SEAL.]

190 *Exhibit E to Amended Complaint.*

STATE OF NEW JERSEY, }
COUNTY OF HUDSON. } SS.:

I, CHARLES S. KEENE, Secretary of Consolidated Tobacco Company, a corporation organized and doing business pursuant to an act of the legislature of New Jersey, entitled "An Act Concerning Corporations (Revision of 1896)," DO HEREBY CERTIFY in accordance with the provisions of Section 105 of said act:

1. That the foregoing agreement for the merger and consolidation of said corporation and The American Tobacco Company and Continental Tobacco Company was
191 made by the directors of said Consolidated Tobacco Company at a duly convened meeting called for the purpose.

2. That the said agreement was submitted to the stockholders of said Consolidated Tobacco Company at a meeting thereof held October 17, 1904, the same being an adjourned meeting of a meeting held September 30, 1904, called for the purpose of taking the same into consideration, of which meeting twenty days' notice of the time, place and object thereof was mailed to the last known post-office address of each of said stockholders.

3. That the said agreement was considered by the stockholders at said meeting and a vote of the stockholders was
192 taken by ballot for the adoption or rejection of said agreement, and that stockholders owning more than two-thirds of the shares of the capital stock of said Consolidated Tobacco Company voted in favor of the adoption of said agreement.

4. That the meeting of stockholders of Consolidated Tobacco Company and the said vote by ballot upon the adoption of said agreement were held and taken separately

from the meetings of stockholders and votes of the said Continental Tobacco Company and The American Tobacco Company.

5. That the principal office of said Consolidated Tobacco Company in the State of New Jersey is at No. 104 First Street, Jersey City, and C. A. Hopman is the agent therein and in charge thereof, upon whom process against the Company may be served.

IN WITNESS WHEREOF, I have hereunto signed my name as Secretary, and affixed the seal of the said Consolidated Tobacco Company, this 19th day of October, 1904.

194

CHARLES S. KEENE,
[SEAL.] *Secretary.*

STATE OF NEW JERSEY, } ss.:
COUNTY OF HUDSON. }

I, WILLIAM H. MCALISTER, Secretary of Continental Tobacco Company, a corporation organized and doing business pursuant to an act of the legislature of New Jersey, entitled "An Act Concerning Corporations (Revision of 1896)," DO HEREBY CERTIFY in accordance with the provisions of Section 105 of said act:

1. That the foregoing agreement for the merger and consolidation of said corporation and The American Tobacco Company and Consolidated Tobacco Company was made by the directors of said Continental Tobacco Company at a duly convened meeting called for the purpose. 195

2. That the said agreement was submitted to the stockholders of said Continental Tobacco Company at a meeting thereof held September 30, 1904, called for the purpose of

taking the same into consideration, of which meeting twenty days' notice of the time, place and object thereof was mailed to the last known post-office address of each of said stockholders.

3. That the said agreement was considered by the stockholders at said meeting and a vote of the stockholders was taken by ballot for the adoption or rejection of said agreement, and that stockholders owning more than two-thirds of the shares of the capital stock of said Continental Tobacco Company, voted in favor of the adoption of said agreement.

197 4. That the meeting of stockholders of Continental Tobacco Company and the said vote by ballot upon the adoption of said agreement were held and taken separately from the meetings of stockhoders and votes of the said Consoidated Tobacco Company and The American Tobacco Company.

5. That the principal office of said Continental Tobacco Company in the State of New Jersey is at No. 104 First Street, Jersey City, and C. A. Hopman is the agent therein and in charge thereof, upon whom process against the Company may be served.

IN WITNESS WHEREOF, I have hereunto signed my name as Secretary and affixed the seal of the said Continental Tobacco Company, this 19th day of October, 1904.

198

WILLIAM H. MCALISTER,
Secretary.

[SEAL.]

Endorsed:

"Filed and Recorded, Oct. 19, 1904.

S. D. DICKINSON,
Secretary of State.

Exhibit E to Amended Complaint. 199

STATE OF NEW JERSEY

DEPARTMENT OF STATE

I, S. D. DICKINSON, *Secretary of State of the State of New Jersey,* DO HEREBY CERTIFY *that the foregoing is a true copy of Agreement of Merger and Consolidation between* THE AMERICAN TOBACCO COMPANY, CONSOLIDATED TOBACCO COMPANY, *and the* CONTINENTAL TOBACCO COMPANY, *as the same is taken from and compared with the original, filed October 19, 1904, and now remaining on file and of record in my office.*

IN TESTIMONY WHEREOF, *I have hereunto set my hand and affixed my Official Seal at Trenton, this Twenty-sixth day of October, A. D., 1904.* 200

S. D. DICKINSON,
Secretary of State."

[SEAL.]

BY-LAWS

of

THE AMERICAN TOBACCO COMPANY

Adopted Oct. 20, 1904
With all Amendments up to December 31, 1930 201

ARTICLE I

Directors

SECTION 1. The number of the directors of this Company is fixed at seventeen, who shall be annually elected

and shall hold office until the next following annual meeting of stockholders, or until their successors are duly elected and qualified.

SECTION 2. The number of the directors may be altered at any time by vote of a majority of the directors at any regular or special meeting.

SECTION 3. A stockholder need not hold more than one share of the stock of the corporation to qualify him to be a director.

SECTION 4. Vacancies among the directors shall be filled
203 by vote of the remaining directors at any regular or special meeting of the Board.

SECTION 5. The directors may hold their meetings and have an office and keep the books of the corporation (except the stock and transfer books) in the City of New York, or elsewhere outside of the State of New Jersey.

SECTION 6. If for any reason the Guaranty Trust Company of New York, of the City of New York, should cease to be transfer agent of the stock and obligations of the corporation, or The Farmers' Loan & Trust Company, of the City of New York, the registrar of the stock of the corporation, or if for any reason it shall be desired to
204 make a change as to either or both, the directors may appoint another as transfer agent in the room and stead of the Guaranty Trust Company of New York, and another as registrar in the room and stead of The Farmers' Loan & Trust Company, as the case may be.

ARTICLE II

Meetings of Stockholders

SECTION 1. The annual meeting of the stockholders of the corporation for the election of directors, and such other business as may properly come before the meeting, shall be held at the principal office of the Company in Jersey City, on the first Wednesday of April, at eleven o'clock in the forenoon, or at such hour as the directors shall appoint before notice of the meeting is given.

SECTION 2. Special meetings of the stockholders, to be held at the principal office of the Company in New Jersey, 206
may be called by the directors for such purposes as shall be specified by resolution.

SECTION 3. Due notice of each annual meeting of the stockholders shall be given by a written or printed notice signed by the Secretary of the Company and mailed, postage prepaid, at least twenty days prior to such meeting, to each stockholder of record entitled to vote thereat, appearing on the books of the Company at the address given thereon, and public notice of the time and place of holding such meeting shall be published not less than once a week for two successive weeks previous thereto in a daily newspaper of general circulation, published in the City of New York.

Due notice of each special meeting shall be given also 207
in the manner above provided. The notice shall state the object of the special meeting, and no other business shall be transacted at such meeting; but this provision shall not apply to annual meetings, at which any business may be transacted without notice of the object of such annual meeting.

SECTION 4. The President of the corporation, if present, shall call to order, and preside at, all meetings of the

stockholders, whether general or special, and the Secretary of the corporation (or in his absence any Assistant Secretary) shall be the Secretary of such meeting; if the President is absent, any Vice-President shall preside. If the President and all the Vice-Presidents are absent, the meeting shall be presided over by the person designated in writing by the President, or any one of the Vice-Presidents. If the President and all the Vice-Presidents are absent, and no one designated by the President or any of the Vice-Presidents is present, the meeting may call any stockholder of record who is entitled to vote for directors, or any person present holding a proxy for such stockholder, to
209 preside. In the absence of the Secretary and Assistant Secretaries, any person may be selected by the meeting to act as Secretary of the meeting.

SECTION 5. Any voting proxy given by a stockholder must be in writing, signed by the stockholder.

SECTION 6. Less than a quorum of the stockholders may adjourn any stockholders' meeting.

SECTION 7. The directors may appoint two inspectors of the annual election at any time before notice of the meeting at which such election is held.

ARTICLE III

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Meetings of Directors

SECTION 1. Regular meetings of the directors shall be held at the office of the Company in the City of New York, on Wednesday of each week. Meetings shall be held at eleven o'clock in the forenoon, except that meetings on the last Wednesday of each month shall be held at four fifteen o'clock in the afternoon. Special meetings may be held as determined by the directors, and may be called by the

President at any time and shall be called by him on the request of three directors.

SECTION 2. No notice need be given of regular meetings of the directors. Reasonable notice shall be given of special meetings; but notice of a meeting may be admitted or waived by all the directors.

SECTION 3. At any meeting five directors shall constitute a quorum.

ARTICLE IV

Officers 212

SECTION 1. The directors shall annually choose from their own number a President and not more than five Vice-Presidents, and shall annually choose a Secretary and a Treasurer, who need not be directors.

SECTION 2. The directors may elect a Comptroller, an Auditor and other officers and define their powers and duties.

SECTION 3. Any two offices not inconsistent with each other may be held by the same person.

SECTION 4. All officers elected by the directors shall hold office, subject to removal by the directors, until their successors are chosen and qualified. 213

SECTION 5. All agents and employees shall be appointed and may be removed by the President, subject to the control of the directors.

SECTION 6. Vacancies among officers of the corporation shall be filled as soon as practicable by vote of the directors at any regular or special meeting.

SECTION 7. The President, if present, shall preside at the meetings of directors, and shall have the management of the Company's affairs, subject to the control of the directors.

SECTION 8. The Vice-Presidents shall have such powers and perform such duties as shall at any time be delegated to them by the directors, and in the absence or disability of the President, one of them shall perform the duties of his office, subject to the control of the directors.

SECTION 9. The Secretary shall give the requisite notice of meetings of stockholders and directors, and shall record
215 the proceedings of such meetings, and besides his powers and duties prescribed by law, shall have such other powers and perform such other duties as shall at any time be required of him by the directors.

SECTION 10. The Secretary shall have the custody of the seal of the corporation and of the books and papers, except those pertaining to the office of Treasurer.

SECTION 11. The Assistant Secretaries shall assist the Secretary in the discharge of his duties and shall have such powers and perform such other duties as shall at any time be delegated to them by the directors, and in the absence or disability of the Secretary, shall perform the
216 duties of his office, subject to the control of the directors.

SECTION 12. The Treasurer shall have charge of the funds and securities of the corporation, and shall keep and deposit the same as required by the directors, and shall keep proper books of account of all receipts and disbursements and official transactions of the corporation, and shall render statements of his accounts as required by the President or the Directors.

SECTION 13. The Treasurer shall give a bond in such sum and with such surety or sureties as shall be required by the directors for the faithful discharge of his duties.

SECTION 14. The Assistant Treasurer shall assist the Treasurer in the discharge of his duties and shall have such powers and perform such other duties as shall at any time be delegated to him by the Directors; and in the absence or disability of the Treasurer, shall perform the duties of his office subject to the control of the directors.

SECTION 15. Any other officer, agent or employee of the corporation may be required to give such security for the faithful performance of his duties as shall be determined by the directors, who shall also determine the custody of any security given. 218

ARTICLE V

Salaries

SECTION 1. The salaries of all officers elected by the directors shall be fixed by the directors.

SECTION 2. Salaries of all other agents and employees shall be fixed by the President, subject to the control of the directors.

ARTICLE VI 219

Seal

SECTION 1. The seal of the corporation shall be used and attested only as directed by the President or by the directors.

ARTICLE VII

Payments

SECTION 1. All claims against the corporation shall, so far as practicable, be paid by checks drawn or indorsed to the order of the person having the claim.

SECTION 2. All checks or bank drafts shall be signed by any two of the following named officers: President, any Vice-President, Secretary, any Assistant Secretary, Treasurer, Assistant Treasurer; and in such other manner as the Directors may from time to time designate.

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SECTION 3. All notes or other obligations and contracts shall be signed by the President, or a Vice-President and the Secretary, or an Assistant Secretary, or the Treasurer, or an Assistant Treasurer.

ARTICLE VIII

Capital Stock

SECTION 1. Certificates of the capital stock of the corporation shall be issued for one or more full shares duly numbered and registered in the order of their issue and shall be in the form the directors shall prescribe.

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SECTION 2. The capital stock shall be transferable on the transfer books of the corporation, subject to these By-Laws, by the owner in person, or by attorney or legal representative, written evidence of whose authority shall be filed with the corporation.

SECTION 3. No transfer of capital stock can be required except upon surrender and cancellation of the certificate representing the same.

SECTION 4. The Board of Directors shall have power to close the stock transfer books for a period not exceeding twenty days, preceding the date of any meeting of the stockholders or at other times and for other purposes; or in lieu of closing the transfer books, the Board of Directors may fix in advance a date, not exceeding twenty days preceding the date of any meeting of stockholders, or the date for the payment of any dividend, or the date for the allotment of rights, or the date when any change or conversion or exchange of capital stock shall go into effect, as a record date for the determination of the stockholders entitled to notice of and to vote at any such meeting, or entitled to receive payment of any such 224
dividend or any such allotment of rights, or to exercise the rights in respect to any such change, conversion or exchange of capital stock; and in such case stockholders of record on the date so fixed shall be exclusively entitled to such notice of and vote at such meeting or at any adjournment thereof, or to receive payment of such dividend, or allotment of rights, or exercise such rights, as the case may be, and notwithstanding any transfer of any stock on the books of this Company after any such record date fixed as aforesaid.

ARTICLE IX

Penalties

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SECTION 1. No director or officer of this Company shall, during his term of office, engage directly or indirectly in any business similar to that in which this Company is or is to be engaged, or in the manufacture or sale of any supplies for or connected therewith, without the consent of two-thirds of the directors of the Company.

Any violation of this provision shall be treated by the Board of Directors, after notice to the offender, as a vaca-

tion of his office, and his successor shall be thereupon duly elected; and the offender shall, in addition, be subject to a penalty of twenty dollars, and to such damages as can be legally collected.

ARTICLE X

Dividends

SECTION 1. Dividends upon the six per cent. cumulative preferred stock of the Company, payable out of the accumulated profits of the Company in excess of such sum, if any, as shall have been reserved as a working capital, shall be declared by the directors so as to be payable on
227 the first business day of January, April, July and October in each and every year, such declaration to be at least fifteen days before the time of payment. When all accrued dividends on the preferred stock have been paid, the directors shall, if in their judgment the surplus or net profits in excess of such sum as shall have been reserved as a working capital, and after deducting the amount of dividends accrued or accruing on the preferred stock during the current year, shall be sufficient for such purpose, have power to declare so as to be payable on the first business day of March, June, September and December in each and every year, a dividend on the common stock and common stock B of the Company, such declaration to be at least fifteen days before the time of payment; and the directors
228 may declare such dividends at other times, and payable at other times, upon the conditions just hereinbefore provided.

ARTICLE XI

Amendments

SECTION 1. These By-Laws may be added to, altered, repealed or suspended at any regular or special meeting by a majority vote, at which not less than one-third of all the directors are present.

ARTICLE XII

SECTION 1. As soon as practicable after the end of the year 1912 and of each year of the Company's operations thereafter, the Treasurer of the Company shall ascertain the net profits, as hereinafter defined, earned by the Company during such year, and if such net profits exceed the sum of $8,222,245.82, which is the estimated amount of such net profits earned during the year 1910 by the businesses that now belong to the Company, the Treasurer shall pay an amount equal in the aggregate to ten per cent. of such excess to the President and five Vice-Presidents of the Company in the following proportions, to wit: One-fourth thereof, or 2½ per cent. of such amount, to the 230
President; one-fifth of the remainder thereof, or 1½ per cent. of such amount, to each of the five Vice-Presidents as salary for the year, in addition to the fixed salary of each of said officers.

SECTON 2. If any such office be vacant for a time amounting in the aggregate to one month in any year, so much of the amount provided by this resolution to be paid to the incumbent of such office as is proportionate to the time of such vacancy shall be returned into the general profit account of the Company. If there shall be a change during the year in the incumbent of any office, the amount hereinbefore provided to be paid shall be divided among the different incumbents of such office in the proportion 231
of their respective periods of incumbency during the year, subject to the above provision in relation to vacancies.

SECTION 3. For the purpose of this By-Law the net profits earned by the Company in any year shall consist of the net earnings made by the Company in its business as a manufacturer and seller of tobacco and its products after deducting all expenses and losses, such provisions as shall be determined by the Board of Directors of the Com-

pany for depreciation and for all outstanding trade obligations, and an additional amount equal to 6 per cent. dividends on $52,459,400 of its 6 per cent. preferred stock, to which profits shall be added, or from which profits shall be deducted, as the case may be, the Company's proportion (based on its stock holdings) of the net profits or losses for the year of its subsidiary companies engaged in the manufacture and sale of smoking tobacco, chewing tobacco, cigarettes, or little cigars, except earnings on preference shares of British-American Tobacco Company, Limited, and shares of Imperial Tobacco Company (of Great Britain and Ireland), Limited.

233 SECTION 4. The declaration of the Treasurer as to the amount of net profits for the year and the sum due anyone hereunder shall be binding and conclusive on all parties, and no one claiming hereunder shall have a right to question the said declaration, or to any examination of the books or accounts of the Company, and nothing herein contained shall give any incumbent of any office any right to claim to continue therein, or any other right except as herein specifically expressed.

SECTON 5. This By-Law may be modified or repealed only by the action of the stockholders of the Company and not by the directors.

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Exhibit F.

235

New York, N. Y.
January 28, 1931.

A regular meeting of the Board of Directors of THE AMERICAN TOBACCO COMPANY was held this day at the office of the Company, No. 111 Fifth Avenue, in the City of New York.

There were present

Messrs. G. W. Hill
J. K. Fletcher
J. G. Hager
T. T. Harkrader
J. B. Harvie 236
C. F. Neiley
W. H. Ogsbury
C. A. Penn
V. Riggio
T. R. Taylor
J. R. Cummings, Asst. Secretary

Mr. G. W. Hill in the Chair.

Mr. J. R. Cummings, Assistant Secretary of the Company, acted as Secretary of the Meeting.

* * * * * * *

Pursuant to resolution adopted by the Board of Directors at its adjourned regular meeting held at 11:00 A. M. of this day, the President submitted to the Board his report and recommendation of stock allotments as requested and authorized by the Board. The President requested that the Board should defer consideration of so much of his report as recommended the number of shares, if any, of the Common Stock B of this corporation to be allotted for subscription to any employees who were members of this Board, to wit: 237

Richard J. Boylan, John K. Fletcher, C. Huntley Gibson, Tullis T. Harkrader, John G. Hager, James B.

238 *Exhibit F to Amended Complaint.*

Harvie, George W. Hill, James E. Lipscomb, Jr., Arthur C. Mower, Charles F. Neiley, William H. Ogsbury, Charles A. Penn, Vincent Riggio and Thomas R. Taylor.

On motion duly made, seconded, and unanimously carried the following resolutions were adopted:

WHEREAS, this Board at its adjourned regular meeting held at 11:00 A. M. of this day adopted a resolution by which, among other things, it requested and authorized the President of the Corporation to consider, report and recommend the names of the employees of this Corporation and/or its subsidiaries and the names of those persons
239 actively engaged in the conduct of its or their business, to whom, in his opinion, shares of the Common Stock B of this corporation should be allotted for subscription under the Employees' Stock Subscription Plan approved and adopted by the stockholders at the special meeting of stockholders held on July 28, 1930, by way of additional compensation for services to be rendered by such employees and persons actively engaged in the conduct of the business to and including December 31, 1931, and the respective amounts of stock which, in his opinion, should be allotted to each person; and

WHEREAS, the President has submitted his report and recommendation as so requested and authorized by this Board; and
240

WHEREAS, this Board, after careful consideration thereof in all respects approves such report and recommendation of the President, except for so much thereof as recommends the allotment of shares of the Common Stock B of this corporation for subscription by any persons who are members of this Board, to wit: Richard J. Boylan, John K. Fletcher, C. Huntley Gibson, Tullis T. Harkrader, John G. Hager, James B. Harvie, George W. Hill, James E.

Lipscomb, Jr., Arthur C. Mower, Charles F. Neiley, William H. Ogsbury, Charles A. Penn, Vincent Riggio and Thomas R. Taylor,

NOW, THEREFORE, BE IT

RESOLVED, that pursuant to the authority vested in this Board by action of the stockholders at such special meeting of July 28, 1930, and in accordance with the provisions of said Employees' Stock Subscription Plan, this Board hereby approves and adopts in all respects such report and recommendation of the President, and allots for subscription to the employees of this Corporation and/or its subsidiaries and the persons actively engaged in the conduct of the business of this Corporation and/or its subsidiaries, named in said report and recommendation, (except to such persons named in said report and recommendation who are members of this Board) the respective amounts of shares set opposite their names therein, by way of additional compensation for services to be rendered by them to and including December 31, 1931, such allotments of such respective amounts of stock to such individuals respectively to be for subscription at the price of $25. per share, to be respectively evidenced by each individual to whom stock is hereby allotted by executing the Subscription Agreement in the form Exhibit B, a copy of which shall be initialled by an Assistant Secretary of this Corporation for identification and attached to the minutes of this meeting, and delivering such executed Subscription Agreement to the Trustees.

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243

The President then requested that the Board give consideration to so much of his report and recommendation as recommended the allotment of shares of the Common Stock B of this corporation for subscription under the

Employees' Stock Subscription Plan to employees of this corporation and/or its subsidiaries and persons actively engaged in the conduct of its or their business who are members of the Board of Directors of this corporation.

On motion duly made, seconded and carried (Mr. Richard J. Boylan being absent and not voting) it was

RESOLVED, that this Board, after careful consideration thereof approves and adopts the recommendation contained in the report of the President with regard to allotment of shares of the Common Stock B of the Corporation for subscription by Richard J. Boylan, and allots for subscription to Richard J. Boylan the amount of shares set opposite his name in said report and recommendation, by way of additional compensation for services to be rendered by him to and including December 31, 1931, such allotment to be for subscription at the price of $25 per share, and to be evidenced by Richard J. Boylan by executing the Subscription Agreement in the form Exhibit B attached to the minutes of this meeting and delivering such executed Subscription Agreement to the Trustees;

On motion duly made, seconded and carried (Mr. C. Huntley Gibson not voting) it was

RESOLVED, that this Board, after careful consideration thereof approves and adopts the recommendation contained in the report of the President with regard to allotment of shares of the Common Stock B of the Corporation for subscription by C. Huntley Gibson, and allots for subscription to C. Huntley Gibson the amount of shares set opposite his name in said report and recommendation, by way of additional compensation for services to be rendered by him to and including December 31, 1931, such allotment to be for subscription at the price of $25 per share, and to be

evidenced by C. Huntley Gibson by executing the Subscription Agreement in the form Exhibit B attached to the minutes of this meeting and delivering such executed Subscription Agreement to the Trustees;

On motion duly made, seconded and carried (Mr. John K. Fletcher not voting) it was

RESOLVED, that this Board, after careful consideration thereof approves and adopts the recommendation contained in the report of the President with regard to allotment of shares of the Common Stock B of the Corporation for subscription by John K. Fletcher, 248
and allots for subscription to John K. Fletcher the amount of shares set opposite his name in said report and recommendation, by way of additional compensation for services to be rendered by him to and including December 31, 1931, such allotment to be for subscription at the price of $25 per share, and to be evidenced by John K. Fletcher by executing the Subscription Agreement in the form Exhibit B attached to the minutes of this meeting and delivering such executed Subscription Agreement to the Trustees;

On motion duly made, seconded and carried (Mr. Tullis T. Harkrader not voting) it was

RESOLVED, that this Board, after careful consideration 249
thereof approves and adopts the recommendation contained in the report of the President with regard to allotment of shares of the Common Stock B of the Corporation for subscription by Tullis T. Harkrader, and allots for subscription to Tullis T. Harkrader the amount of shares set opposite his name in said report and recommendation, by way of additional compensation for services to be rendered by him to and in-

cluding December 31, 1931, such allotment to be for subscription at the price of $25 per share, and to be evidenced by Tullis T. Harkrader by executing the Subscription Agreement in the form Exhibit B attached to the minutes of this meeting and delivering such executed Subscription Agreement to the Trustees;

On motion duly made, seconded and carried (Mr. John G. Hager not voting) it was

RESOLVED, that this Board, after careful consideration thereof approves and adopts the recommendation contained in the report of the President with regard to allotment of shares of the Common Stock B of the Corporation for subscription by John G. Hager, and allots for subscription to John G. Hager the amount of shares set opposite his name in said report and recommendation, by way of additional compensation for services to be rendered by him to and including December 31, 1931, such allotment to be for subscription at the price of $25 per share, and to be evidenced by John G. Hager by executing the Subscription Agreement in the form Exhibit B attached to the minutes of this meeting and delivering such executed Subscription Agreement to the Trustees;

On motion duly made, seconded and carried (Mr. James B. Harvie not voting) it was

RESOLVED, that this Board, after careful consideration thereof approves and adopts the recommendation contained in the report of the President with regard to allotment of shares of the Common Stock B of the Corporation for subscription by James B. Harvie, and allots for subscription to James B. Harvie the amount of shares set opposite his name in said report and recommendation, by way of additional compensation

for services to be rendered by him to and including December 31, 1931, such allotment to be for subscription at the price of $25 per share, and to be evidenced by James B. Harvie by executing the Subscription Agreement in the form Exhibit B attached to the minutes of this meeting and delivering such executed Subscription Agreement to the Trustees;

On motion duly made, seconded and carried (Mr. George W. Hill not voting) it was

RESOLVED, that this Board, after careful consideration thereof approves and adopts the recommendation contained in the report of the President with regard 254 to allotment of shares of the Common Stock B of the Corporation for subscription by George W. Hill, and allots for subscription to George W. Hill the amount of shares set opposite his name in said report and recommendation by way of additional compensation for services to be rendered by him to and including December 31, 1931, such allotment to be for subscription at the price of $25 per share, and to be evidenced by George W. Hill by executing the Subscription Agreement in the form Exhibit B attached to the minutes of this meeting and delivering such executed Subscription Agreement to the Trustees;

On motion duly made, seconded and carried (Mr. James 255 E. Lipscomb, Jr., being absent and not voting) it was

RESOLVED, that this Board, after careful consideration thereof approves and adopts the recommendation contained in the report of the President with regard to allotment of shares of the Common Stock B of the Corporation for subscription by James E. Lipscomb, Jr., and allots for subscription to James E. Lipscomb, Jr., the amount of shares set opposite his name in said report and recommendation, by way of additional

compensation for services to be rendered by him to and including December 31, 1931, such allotments to be for subscription at the price of $25 per share, and to be evidenced by James E. Lipscomb, Jr., by executing the Subscription Agreement in the form Exhibit B attached to the minutes of this meeting and delivering such executed Subscription Agreement to the Trustees;

On motion duly made, seconded and carried (Mr. Arthur C. Mower being absent and not voting) it was

RESOLVED, that this Board, after careful consideration thereof approves and adopts the recommendation
257 contained in the report of the President with regard to allotment of shares of the Common Stock B of the Corporation for subscription by Arthur C. Mower, and allots for subscription to Arthur C. Mower the amount of shares set opposite his name in said report and recommendation, by way of additional compensation for services to be rendered by him to and including December 31, 1931, such allotment to be for subscription at the price of $25 per share, and to be evidenced by Arthur C. Mower by executing the Subscription Agreement in the form Exhibit B attached to the minutes of this meeting and delivering such executed Subscription Agreement to the Trus-
258 tees;

On motion duly made, seconded and carried (Mr. Charles F. Neiley not voting) it was

RESOLVED, that this Board, after careful consideration thereof approves and adopts the recommendation contained in the report of the President with regard to allotment of shares of the Common Stock B of the Corporation for subscription by Charles F. Neiley, and allots for subscription to Charles F. Neiley the

amount of shares set opposite his name in said report and recommendation, by way of additional compensation for services to be rendered by him to and including December 31, 1931, such allotment to be for subscription at the price of $25 a share, and to be evidenced by Charles F. Neiley by executing the Subscription Agreement in the form Exhibit B attached to the minutes of this meeting and delivering such executed Subscription Agreement to the Trustees;

On motion duly made, seconded and carried (Mr. William H. Ogsbury not voting) it was

RESOLVED, that this Board, after careful consideration thereof approves and adopts the recommendation contained in the report of the President with regard to allotment of shares of the Common Stock B of the Corporation for subscription by William H. Ogsbury, and allots for subscription to William H. Ogsbury the amount of shares set opposite his name in said report and recommendation, by way of additional compensation for services to be rendered by him to and including December 31, 1931, such allotment to be for subscription at the price of $25 a share, and to be evidenced by William H. Ogsbury by executing the Subscription Agreement in the form Exhibit B attached to the minutes of this meeting and delivering such executed Subscription Agreement to the Trustees; 260 261

On motion duly made, seconded and carried (Mr. Charles A. Penn not voting) it was

RESOLVED, that this Board, after careful consideration thereof approves and adopts the recommendation contained in the report of the President with regard to allotment of shares of the Common Stock B of the

Corporation for subscription by Charles A. Penn, and allots for subscription to Charles A. Penn the amount of shares set opposite his name in said report and recommendation, by way of additional compensation for services to be rendered by him to and including December 31, 1931, such allotment to be for subscription at the price of $25 a share, and to be evidenced by Charles A. Penn by executing the Subscription Agreement in the form Exhibit B attached to the minutes of this meeting and delivering such executed Subscription Agreement to the Trustees;

263 On motion duly made, seconded and carried (Mr. Vincent Riggio not voting) it was

RESOLVED, that this Board, after careful consideration thereof approves and adopts the recommendation contained in the report of the President with regard to allotment of shares of the Common Stock B of the Corporation for subscription by Vincent Riggio, and allots for subscription to Vincent Riggio the amount of shares set opposite his name in said report and recommendation, by way of additional compensation for services to be rendered by him to and including December 31, 1931, such allotment to be for subscription at the price of $25 per share, and to be evidenced by Vincent Riggio by executing the Subscription
264 Agreement in the form Exhibit B attached to the minutes of this meeting and delivering such executed Subscription Agreement to the Trustees;

On motion duly made, seconded and carried (Mr. Thomas R. Taylor not voting) it was

RESOLVED, that this Board, after careful consideration thereof approves and adopts the recommendation contained in the report of the President with regard

to allotment of shares of the Common Stock B of the Corporation for subscription by Thomas R. Taylor, and allots for subscription to Thomas R. Taylor the amount of shares set opposite his name in said report and recommendation, by way of additional compensation for services to be rendered by him to and including December 31, 1931, such allotment to be for subscription at the price of $25 a share, and to be evidenced by Thomas R. Taylor by executing the Subscription Agreement in the form Exhibit B attached to the minutes of this meeting and delivering such executed Subscription Agreement to the Trustees.

There was then presented to the meeting a form of Subscription Agreement and a form of Trust Agreement which were examined and discussed by the members of the Board present. 266

Thereafter, on motion duly made, seconded and unanimously adopted, it was

RESOLVED, that for the purpose of conveniently carrying into effect and operation the Plan and the purchase of shares of stock of this corporation allotted and subscribed for thereunder, the officers of this corporation are hereby authorized to execute on its behalf a Trust Agreement, appointing the Guaranty Trust Company of New York and Junius Parker as Trustees on behalf of persons to whom stock is allotted under the Plan and who execute Subscription Agreements in the form attached to said Trust Agreement as Exhibit B, the said Trust Agreement and the said Subscription Agreement, Exhibit B attached thereto, to be in substantially the form submitted to this Board at this meeting, a copy of which has been initialed by the assistant secretary of this corporation for identifi- 267

cation and attached to the minutes of this meeting, with such changes as the officers executing the Trust Agreement on behalf of this corporation may approve; and

FURTHER RESOLVED, that this Board hereby authorizes the sale to Guaranty Trust Company of New York and Junius Parker as Trustees on behalf of Participating Employees under said Trust Agreement, of such number of shares of the unissued Common Stock B of this corporation of the par value of $25 per share (not in excess of an aggregate of 56,712 shares) as shall under said Plan be allotted to, and subscribed
269 for by execution of Subscription Agreements in the form hereinabove referred to as Exhibit B, by employees of this corporation and/or its subsidiaries and those actively engaged in the conduct of its or their business; and

FURTHER RESOLVED, that the President and other officers of this Corporation are hereby authorized, directed and empowered to take all such steps and to do any and all such acts and things necessary and proper to execute, carry out and accomplish the full purpose and intent of these resolutions and said resolutions of this Board adopted at its adjourned regular meeting held at 11:00 A. M. this day, and the purpose and intent of said Plan.

270

Exhibit G.

271

THE AMERICAN TOBACCO COMPANY

EMPLOYEE'S STOCK SUBSCRIPTION PLAN

1931

FOR THE INFORMATION *of the Stockholders of The American Tobacco Company, there is submitted this statement relative to the Employees' Stock Subscription Plan as authorized at the special meeting of Stockholders of the Company held on July 28, 1930.*

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Accompanying the notice of the special Stockholders' meeting of July 28, 1930, sent to all stockholders, was a copy of a proposed Employees' Stock Subscription Plan to be submitted to the meeting, also a letter from George W. Hill, President of the Company, containing the following:

"Your Board of Directors takes pleasure in reporting that, notwithstanding the high record of last year as reflected in the Treasurer's report submitted to you at the last Annual Meeting, your Company's business during the first five months of the current year has surpassed all previous records for corresponding periods. The net profits for the first five months of this year, as shown by the books of the Company, after allowing for bond interest and preferred dividends, show an increase of more than 100% over the figures for the corresponding period of last year, and the outlook for the remainder of the year 1930 is very encouraging. This situation enables us to take those steps in the interest of our Stockholders which we predicted in 1929."

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There followed a reference to the proposed split-up of shares of Common Stock, including Common Stock B, and the necessary accompanying change in the voting power of the preferred stock. The letter then continued:

> "There will also be submitted to the Stockholders at this special meeting a plan for the issuance and sale of shares of Common Stock B of the Company to employees and persons actively engaged in the conduct of the Company's business. A copy of the plan is enclosed. I am certain that every Stockholder will agree that it is to the Company's interest that the organization which has made possible the great suc-
> 275 cess which the Company has enjoyed during the past few years should be given every encouragement to continue in the Company's employ. It is the purpose of this plan, conforming with the policies of many large business enterprises, to offer inducements by way of stock ownership in the Company to the men who have made that success possible, so that the Company and its Stockholders will have the assurance of their continued services in carrying the business forward with maximum enthusiasm and efficiency."

THE PLAN

The Plan, which, as above stated, was printed in full and attached to the notice of the special stockholders'
276 meeting of July 28, 1930, mailed to all stockholders, stated that its purpose was

> "to accord to such employees of The American Tobacco Company and its subsidiaries and to those actively engaged in the conduct of its or their business, as may be selected as herein provided, by way of additional compensation for services to be rendered, an opportunity to purchase shares of stock of the Corporation."

The Plan provided that the stock to be allotted for subscription was to be unissued Common Stock B which might be authorized at the same meeting of stockholders at which the Plan might be approved, but it was provided that there should at no time be any issuance of shares under the Plan when the effect of such issuance would be to increase the total number of shares of Common Stock and Common Stock B issued and outstanding above an aggregate of five million shares.

The Plan further provided that the Board of Directors might at such time or times as it might determine, by way of additional compensation for services to be rendered, offer and allot such stock for subscription to employees of the Corporation and/or its subsidiaries and to those 278 actively engaged in the conduct of its or their business in such amounts and proportions, to such persons, at such prices, not less than the par value of the shares allotted, payable in full or in instalments, and upon such other terms and conditions, all as should be determined with respect to each offering of stock to each individual, pursuant to authority to be granted by the Board of Directors to the President for such purpose.

The Plan further provided that no stock was to be delivered until fully paid for, but dividends were to be credited to the subscriber on account of payments agreed to be made by him in the purchase of such stock.

The Plan further provided that no employee or person actively engaged in the conduct of the business of the Cor- 279 poration or its subsidiaries was to be deemed ineligible to the benefits of the Plan by reason of his being also a director of the Corporation or of any of its subsidiaries or of holding any office therein.

Approval Granted by Stockholders

The response of the Stockholders to the various proposals contained in the notice and in the President's letter

was one of overwhelming approval. The attendance of Stockholders at the meeting in person and by proxy was approximately eighty per cent of the total outstanding stock, this being the largest amount of stock ever represented at a Stockholders' meeting of the Company. Both on the vote for the proposed changes in the capital structure and on the vote for the Employees' Stock Subscription Plan, the vote far exceeded the two-thirds required by the laws of New Jersey. The total of votes of Preferred, Common and Common B shares voting in favor of the Plan was 2,228,488 and a total of 2,112 shares voted against. In other words, approximately 99.991% of the
281 stock present in person or by proxy voted in favor of the Employees' Stock Subscription Plan and approximately 80% of the total outstanding stock of the Company approved the Plan.

RESULTS ACHIEVED BY PRESENT MANAGEMENT AND OPERATING PERSONNEL

Your Board of Directors deemed it advisable to wait until the results of the Company's operations for the entire year 1930 were known before taking any action to put the Employees' Stock Subscription Plan into effect. By the latter part of January, 1931, it was apparent that the Company had both in volume of business and net profits far surpassed, in the year 1930, the results of any previous
282 year of its history, including the period before the break-up of the old American Tobacco Company as a result of the Government's suit.

For instance in 1911, during the first eleven months of which the Company was still the owner of all the brands and stocks in other companies which it was subsequently compelled to dispose of under the final decree in the Sherman Law case, the earnings of the Company for its preferred and common stock were $30,633,314. After the dissolution under the Court decree and the resulting loss

of most of the brands and subsidiary companies, the net earnings of your Company dropped, until in 1915 they amounted to only $11,234,581. In December, 1925, Mr. George W. Hill became President of the Company and proceeded to build up the present management. Prior to that date the Lucky Strike Cigarette, which now constitutes the principal business of your Company, had been originated by Mr. Hill, who designed the package, including the wording, the name, the color and the shape, and Mr. Charles A. Penn, now Vice-President, who worked out the blend.

The results achieved under the present management speak for themselves.

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Sales of Cigarettes

Year	*Proportion of total Cigarette Production (based on U. S. Internal Revenue figures)*
1926	20.14%
1927	22.44%
1928	29.59%
1929	34.16%
1930	38.10%

The Government figures for the year 1930 compared with 1929 show an increase in total cigarette production of Five hundred eighty-six million seventy thousand (586,070,000) cigarettes. The Lucky Strike Cigarettes alone by actual sales* for the year 1930 show an increase 285
over 1929 of more than Six billion two hundred nineteen million (6,219,000,000) cigarettes, a greater increase by more than Five billion five hundred million (5,500,000,000) cigarettes than shown by all cigarettes combined.

*In view of public statements which have been brought to our attention, apparently designed to detract from the tremendous success of Lucky Strike Cigarettes, to the effect that the statements of Lucky Strike sales published by The American Tobacco Company include exports, we will take this opportunity of stating without qualification or reservation that public statements of Lucky Strike sales represent only domestic sales and are therefore directly comparative with the United States Revenue figures.

286 *Exhibit G to Amended Complaint.*

The net earnings of the Company and dividends are also indicative of what has been accomplished for the stockholders by the management:

Net Earnings of the Company After Deducting All Expenses for Management, Taxes, Depreciation, etc.

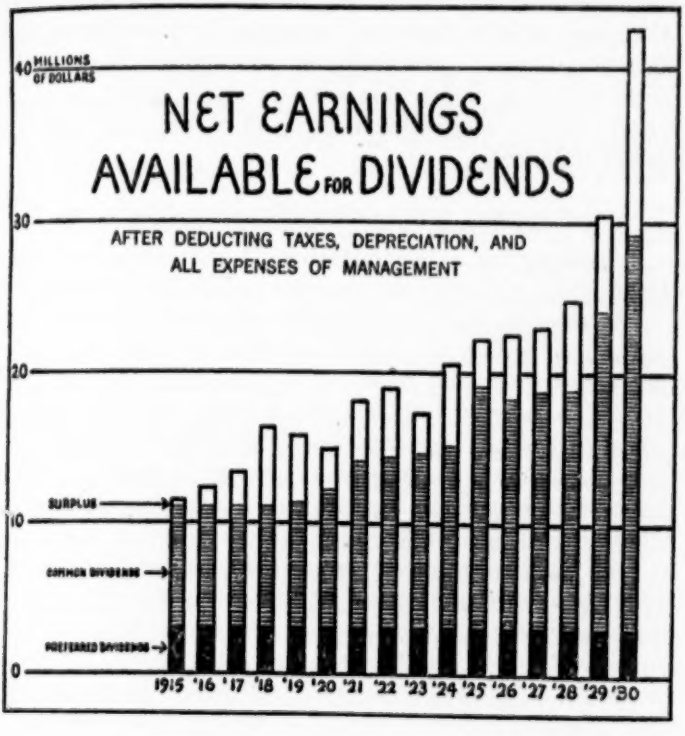
Year	*Amount*
1924	$20,839,694
1925	22,288,596
1926	22,549,094
1927	23,309,689
1928	25,066,299
287 1929	30,231,348
1930	43,345,370

Dividends on Common Stock and Common Stock B

Year	*Amount*
1924	$12,202,675
1925	16,109,922
1926	15,622,486
1927	15,622,856
1928	15,623,172
1929	21,091,536
1930	29,293,983

In addition, the Company has paid dividends on the preferred stock each year of $3,161,982.

288 The following graphic chart shows, by years, the net earnings of the Company available for dividends from 1915 to 1930 inclusive, after deducting taxes, depreciation and all expenses of management, and the second chart (appearing on page 7) shows, by years, the amounts earned per share on Common and Common B Stock during the same period.



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EARNINGS FOR 1930—A YEAR OF ACUTE DEPRESSION

It will be noted that the earnings of the Company for the year 1930 are $43,345,370, an increase of more than 43% over the year 1929, and that the dividends paid in 1930 upon the Common Stock and Common Stock B alone amounted to $29,293,983. 291

This was in the year of probably the worst depression that this country has ever experienced. Reported statistics show that 1,326 banks failed during the year 1930; that 782 corporations of public ownership reduced their cash dividends on common stocks and 470 corporations reduced

their cash dividends on preferred stock, whereas your Company paid in that year upon its Common Stock and Common Stock B, dividends substantially exceeding the total earnings of the Company on its Common Stock in 1911, when it controlled a large part of the world's tobacco industry.

COMPARISON WITH OTHER TOBACCO COMPANIES

A comparison of the earnings of your Company with those of its principal competitors is also illuminating.

The total increase in earnings available for stockholders (after deducting bond interest, etc.) for the year 1930
293 compared with 1929, of the three principal competitors of your Company, was $6,309,039, whereas your Company's increase in such earnings for 1930 compared with 1929 was $13,116,165. In other words, your Company increased its earnings by more than twice as much as all three of its principal competitors combined.

The total earnings of those three competitors for the year 1930 (deducting bond interest, etc.) was $61,873,343, whereas such earnings of your Company for that year amounted to $43,294,769. In other words, for every dollar made for their stockholders in 1930 by the three competitors combined, your Company earned seventy cents.

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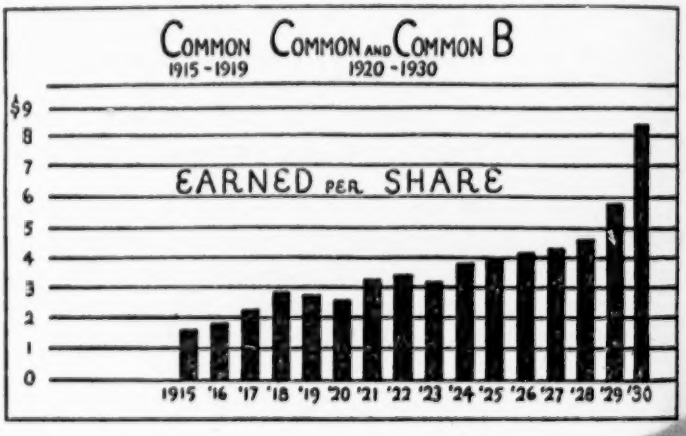

STOCKHOLDERS' ACTION IN LINE WITH MODERN CORPORATE BUSINESS PRACTICE

It is obvious that such outstanding success as is pictured in the foregoing brief outline was not the result of accident or good fortune but was based upon able leadership and the teamwork of a well-knit, efficient organization.

It is strikingly apparent that nothing could be more vital to the interests of the Stockholders of this Company than the creation of a definite incentive to the management and organization which has accomplished the remarkable achievement above outlined and thus stimulate it to even greater efforts in the future. This is definitely 296
in line with accepted modern corporate business practice. The action of the Stockholders at the meeting in July, 1930, was intelligently directed to that end in authorizing, as they did by a great majority, the Employees' Stock Subscription Plan. The object of that Plan was, by offering additional compensation for future services by way of stock ownership in the Company, to furnish the necessary stimulus and incentive to the employees and those engaged in the conduct of the Company's business who had achieved such remarkable results for the Stockholders in the past, and thus stimulate and encourage them to continue and even better those results. It was with recognition of these principles underlying such action of the Stockholders that the Directors in January, 1931, took up the task of put-
ting into effect the Plan thus authorized by the stock- 297
holders.

FORMULA DEVELOPED AND PUT INTO OPERATION

Approximately 312,000 shares of Common Stock B were available for allotment under the Plan. It seemed advisable to allot only about one-sixth of these shares at this time, leaving the balance for future use. Accordingly, 56,712 shares were allotted to employees.

298 *Exhibit G to Amended Complaint.*

It was next necessary to select the employees who were to participate in the Plan. After careful consideration it was the opinion of the Directors that the maximum beneficial results from the Plan would be obtained by extending it to a list of five hundred and thirty-five employees, beginning with the President and going down to and including sub-assistants in factory departments. As, with one exception, all of your Directors are executives engaged in carrying on the business of your Company, this list included all but one of the Directors. No Director voted upon his own allotment.

Inasmuch as the comparative value of employees to a
299 business concern is almost invariably to be determined from the salaries or wages respectively paid to them, it seemed wise to adopt, as a general formula in allotting stock, a fixed ratio to the cash compensation which the Company was paying to each participant, adjusting the exact amount on the merits of each particular case. For this purpose the heads of all departments prepared lists of the employees who were to participate, rating all such employees in their respective departments on the basis of what was deemed to be their value to the Company, 100% representing the highest possible rating. The subscription price of stock allotted under the Plan was fixed at $25 per share. To each employee rating 100%, shares were allotted having a par value of one-third of his annual rate of compensation during the year 1930. Employees rating
300 less than 100% were allotted a smaller amount of stock.

ARTICLE XII OF THE BY-LAWS

The compensation so taken into account in making allotments under the Plan, included money compensation of every kind, whether fixed salary or contingent compensation. It therefore included, as to the President and the five Vice-Presidents, compensation under Article XII of the by-laws adopted by vote of the Stockholders of the Company in 1912.

That by-law is believed to have been originally suggested by the late Mr. James B. Duke, and we understand that by-laws similar in principle and percentage, although differing in form and method of application, were, at his instance, adopted by most of the other companies that emerged from the old American Tobacco Company as a result of the court decree in 1911.

That by-law provided in effect that in any year beginning with the year 1912 in which the net profits earned by The American Tobacco Company in the tobacco business exceeded $11,369,000 (to wit, $8,222,245.82, the amount of net profits earned in 1910 by the businesses retained by The American Tobacco Company under the 302
Federal decree in the anti-trust case, plus approximately $3,147,000, annual dividends on the 6% Preferred Stock of the Company) the Treasurer of the Company was to pay an amount equal in the aggregate to 10% of such excess of net profits to the President and the five Vice-Presidents of the Company. One-quarter, or 2½%, of such amount was to go to the Persident and the remaining 7½% to be divided among the five Vice-Presidents. Such payments were to be as salary for any such year, in addition to the fixed salaries of each of said officers.

It was provided that the net profits for the purposes of such by-laws should consist of the net earnings made by the Company in its business as a manufacturer and seller of tobacco and its products after deducting all expenses and losses, such provisions as should be determined by the 303
Board of Directors of the Company for depreciation and for all outstanding trade obligations, and an additional amount equal to 6% dividends on $52,459,400 of its 6% preferred stock, to which profits should be added, or from which profits should be deducted, as the case might be, the Company's proportion (based on its stock holdings) of the net profits or losses for the year, of its subsidiary companies engaged in the manufacture and sale of smoking tobacco, chewing tobacco, cigarettes, or little cigars,

except earnings on preference shares of British-American Tobacco Company, Limited and shares of Imperial Tobacco Company (of Great Britain and Ireland), Limited. It is to be noted that although the Company ordinarily has income from sources, other than those included in this by-law—such, for instance, as that from the American Cigar Company and certain other Subsidiaries—the income from such other sources is excluded and this compensation is restricted and based only upon the profits from sources included in the language of the by-law. It will also be noted that this compensation, based upon the net profits of the Company, was adopted by the Stock-
305 holders in 1912 and is in no wise dependent on any vote of the Directors or action of officers. It is, as it states itself to be, a "salary for the year, in addition to the fixed salary of each of said officers". The statement of net profits shown on the Company's annual reports to stockholders represents the amount of net profits remaining after the deduction of such compensation, as well as all expenses of management of whatsoever character, including depreciation and obsolescence and also after deducting taxes, of which over One hundred and fifty million dollars ($150,000,000) were paid to the United States Government alone for the year 1930.

The sound common sense underlying Mr. Duke's plan of contingent compensation to executives is amply demonstrated by the great advances made by the several com-
306 panies to which it was applicable, but in no case has it been more completely justified than in that of The American Tobacco Company as exemplified by its progress and brilliant success.

Arrangements With Employees Participating Under the Plan

The arrangements for the sale of stock to employees under the Plan have been carefully safeguarded in order

that they might be fair and just both to the Company and its employees. A copy of the form of agreement made with employees participating in the Plan forms a part of this statement. All dividends upon the stock are credited upon the purchase price. No stock is to be delivered to the employee until fully paid for. The 56,712 shares of stock which have been allotted are by way of additional compensation for services to be rendered during the year 1931, and will not in any event be delivered until the end of the year. An employee whose connection with the Company is severed during the year 1931 for any reason, except his death, loses his right to the stock, although such loss may be waived in whole or in part by the Trustees on behalf of the Company, it being contemplated that special circumstances might exist in some cases for the mitigation of the severity of this rule. If any employee dies during the year, his allotment will be reduced based on the proportion of the year elapsing up to his death. 308

Each employee to whom stock was allotted under the Plan received the following letter from the President of the Company:

"January 30, 1931.

"I have the pleasure of saying to you, that, under authority granted by Stockholders on July 28, 1930, there has been allotted to you by the Directors of this Company, ... shares of American Tobacco Company 'B' Stock, to be sold to you at par—$25 per share and that in the course of a few days, you will receive from Mr. Thos. R. Taylor, Vice-President of the Company, the papers covering this sale and information regarding the details thereof. 309

"My purpose in writing you this letter, is to definitely say to you, that, in my opinion, the Stockholders have been generous in this recognition that they permit the Directors to make of your service and to point out to you that the allocation has been made to

you for the purpose of still further stimulating your efforts in the Company's behalf.

"Whether you are in charge of a factory or a Department, or whatsoever of our activities come under your direction, the allotment of stock has been made to you, based upon what the Officers of this Company deemed your efficiency to be. It is not given to you for services that have heretofore been rendered; it is not given to you in the nature of a bonus. The purpose of the allotment of stock, is solely to urge upon you further interest in the development of your Company's affairs.

311 "If you have been economical, industrious, resourceful and energetic in your attention to Company matters entrusted to your care (and to have been allocated the above amount of stock, you must have shown some of these virtues), I desire to emphasize to you that the Company will expect from you even greater application, even greater interest in the future than you have shown in the past.

"While I have no authority to make any commitment, it is my hope that sometime in the future, the Board will again be in a position whereby they may recognize the services that you will perform and the merit and value that you will deliver to your Company. I desire to assure you that if that time again comes, such recognition will be based upon the merits

312 that you demonstrate.

"I do not want you to feel that this liberal action of your Company has placed you in the position whereby your services become, in your opinion, indispensable. I want you to realize that you must go forward in your striving and that, indeed, although now your efforts have been well recognized, recognition in the future will depend upon services rendered in the future and that if such recognition does not come to you, should it come to others, it might well be

that the position that you fill could be more ably filled by another.

"I congratulate you upon the recognition accorded you by the Board of Directors and in all friendship I send you this letter of encouragement, of frankness and good-will.

Cordially yours,

GEORGE W. HILL,
President."

Although the Company has always had an exceedingly hardworking and loyal organization, it has been demonstrated, even in the few weeks that have elapsed since the 314
allotment of stock to employees under the Plan, that the tangible indication of the Company's appreciation of their work, evidenced thereby, had made itself felt and is evidenced in the increased enthusiasm of employees on their jobs, this being true in every branch of the organization.

There follows herewith a detailed statement of the shares of stock allotted to each individual employee to whom stock has been allocated. The names of the individuals are omitted for organization reasons.

President	13,440
Vice-Presidents	16,685

315

316 *Exhibit G to Amended Complaint.*

1	980	35	130	69	75	103	50
2	665	36	130	70	75	104	50
3	560	37	130	71	75	105	50
4	400	38	130	72	75	106	50
5	330	39	125	73	75	107	50
6	260	40	125	74	75	108	50
7	260	41	125	75	70	109	50
8	260	42	125	76	65	110	50
9	260	43	120	77	65	111	50
10	260	44	110	78	65	112	50
11	250	45	110	79	60	113	50
12	250	46	100	80	60	114	50
317 13	250	47	100	81	60	115	50
14	240	48	100	82	60	116	50
15	240	49	100	83	60	117	50
16	220	50	100	84	60	118	50
17	220	51	100	85	60	119	50
18	210	52	100	86	60	120	50
19	200	53	100	87	60	121	50
20	200	54	100	88	60	122	50
21	200	55	100	89	60	123	50
22	200	56	100	90	60	124	50
23	200	57	90	91	60	125	50
24	200	58	85	92	60	126	50
25	187	59	85	93	55	127	50
26	165	60	80	94	55	128	50
27	160	61	80	95	50	129	50
318 28	160	62	75	96	50	130	50
29	160	63	75	97	50	131	50
30	160	64	75	98	50	132	50
31	160	65	75	99	50	133	50
32	150	66	75	100	50	134	50
33	150	67	75	101	50	135	50
34	135	68	75	102	50	136	50

137..... 50	171..... 40	205..... 35	239..... 35
138..... 50	172..... 40	206..... 35	240..... 35
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168..... 40	202..... 35	236..... 35	270..... 30
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322 *Exhibit G to Amended Complaint.*

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274..... 30	308..... 25	342..... 25	376..... 25
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323 286..... 30	320..... 25	354..... 25	388..... 20
287..... 30	321..... 25	355..... 25	389..... 20
288..... 30	322..... 25	356..... 25	390..... 20
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409	20	440	20	471	20	502	15
410	20	441	20	472	20	503	15
411	20	442	20	473	20	504	15
412	20	443	20	474	20	505	15
413	20	444	20	475	20	506	15
414	20	445	20	476	20	507	15
415	20	446	20	477	20	508	15
416	20	447	20	478	20	509	15
417	20	448	20	479	20	510	15
418	20	449	20	480	15	511	15
419	20	450	20	481	15	512	15
420	20	451	20	482	15	513	15
421	20	452	20	483	15	514	15
422	20	453	20	484	15	515	15
423	20	454	20	485	15	516	15
424	20	455	20	486	15	517	15
425	20	456	20	487	15	518	15
426	20	457	20	488	15	519	15
427	20	458	20	489	15	520	15
428	20	459	20	490	15	521	15
429	20	460	20	491	15	522	15
430	20	461	20	492	15	523	10
431	20	462	20	493	15	524	10
432	20	463	20	494	15	525	10
433	20	464	20	495	15	526	10
434	20	465	20	496	15	527	10
435	20	466	20	497	15	528	10
436	20	467	20	498	15	529	10
437	20	468	20	499	15		
438	20	469	20	500	15		
439	20	470	20	501	15		

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328 *Exhibit G to Amended Complaint.*

SUBSCRIPTION AGREEMENT FOR STOCK OFFERED FOR SUBSCRIPTION UNDER EMPLOYEES' STOCK SUBSCRIPTION PLAN OF THE AMERICAN TOBACCO COMPANY, 1931, BETWEEN THE COMPANY, THE RESPECTIVE EMPLOYEES AND JUNIUS PARKER, ESQ., AND GUARANTY TRUST COMPANY OF NEW YORK, TRUSTEES

New York, N. Y., January 31, 1931.

To.....

.....

329 Under the Employees' Stock Subscription Plan approved at a Special Stockholders' Meeting of The American Tobacco Company (hereinafter referred to as the "Company") on July 28, 1930, there have been allotted to you (you are hereinafter referred to as the "Participant" and you and others subscribing for stock now offered under said Plan are hereinafter collectively referred to as "Participants"), for subscription and purchase by you, by way of additional compensation for services to be rendered by you to the Company and/or its subsidiaries to and including December 31, 1931, ... shares (hereinafter called the "Stock") of the Common Stock B of the Company upon the following terms and conditions, to wit:

330 1. *Price:* The Stock is offered to the Participant for subscription at $25 per share.

2. *Trustees:* An agreement has been entered into by the Company dated January 30, 1931 (a copy of which is hereto annexed marked Schedule "1"), appointing the undersigned Guaranty Trust Company of New York and Junius Parker, Trustees. The Participant hereby approves and ratifies said agreement and agrees to be bound by the terms thereof and consents and agrees that the

Trustees and the Company may take any action thereby authorized or permitted.

The word "Trustees" when used herein refers to the said Guaranty Trust Company of New York and Junius Parker as such Trustees and/or their respective successor and/or successors as such Trustees.

3. *Loan, Pledge of Stock, Etc.:* For the purpose of purchasing from the Company and carrying the stock allotted to and subscribed for by Participants under said Plan until the same has been paid for by the respective Participants, a loan or loans have been or will be negotiated by the Trustees, in an aggregate amount equal to $25 per share on the number of shares of Common Stock B of the 332
Company allotted to and subscribed for by Participants. The proceeds of such loan or loans shall be used to purchase from the Company at $25 per share, the stock allotted to and subscribed for by Participants. Said Trustees shall accept payments from the Participants and make delivery of the Stock in accordance with the terms hereof. The Trustees shall have the right to make said loan or loans and any loan or loans in renewal or substitution therefor in whole or in part, on such terms and conditions, at such rate of interest and otherwise as in their uncontrolled discretion they may deem advisable, and shall have the right to pledge as security for such loan and/or any loan obtained by them in renewal or substitution therefor in whole or in part, all or any part 333
of any stock subscribed for by the Participants (including any stock dividends thereon and any stock and/or other securities purchased by the Trustees on the exercise of rights as provided herein) as well as the Subscription Agreements of Participants, provided that any such stock subscribed for by Participants and any stock dividends thereon and stock and other securities purchased under rights issued in connection therewith, and any such Subscription Agreement of any Participant, so pledged, shall

be withdrawn by the Trustees from such pledge when payment in full of the purchase price of such stock, including interest, shall have been made by such Participant subscribing therefor.

4. *Interest:* The Participant shall pay interest to the Trustees on all unpaid balances of the purchase price, at such rate not in excess of six per centum per annum as the Trustees may fix from time to time.

5. *Terms of Payments:* The purchase price shall be paid by the Participant to the Trustees in quarterly instalments of $1.25 per share on the first days of March,
335 June, September and December, which payments will be applied against the purchase price and interest thereon. The quarterly cash dividends and extra cash dividends, if any, paid on the Stock and on stock dividends paid on the Stock and on stock purchased under rights issued with respect thereto shall be applied by the Trustees to the payment of such purchase price and interest. As long as cash dividends on the Common Stock B at or in excess of the present rate of $1.25 per share per quarter are paid by the Company, such application thereof upon the purchase price and interest shall constitute compliance with the above requirement for quarterly payments. The Participant shall have the right to make additional payments on the purchase price at any time and from time to time until
336 the purchase price of the Stock and interest thereon is paid in full.

6. *Place of Payment:* All payments are to be made in New York funds to Guaranty Trust Company of New York, 140 Broadway, New York, N. Y.

7. *Delivery of Stock:* The stock certificates shall not be delivered by the Trustees to the Participant until the purchase price of the Stock and all interest accrued there-

on shall have been paid in full and in any event shall not be delivered to the Participant until after December 31, 1931, nor shall the Participant be or be deemed to be the owner of the Stock or of any stock dividends thereon or of stock or other securities purchased under rights issued in connection therewith, until he becomes entitled to delivery thereof under the terms of this Subscription Agreement and the stock certificates and other securities, if any, are delivered to him.

8. *Voting Rights:* All voting rights, if any, on the Stock and on stock dividends paid on the Stock and on stock purchased under rights issued with respect thereto are to be vested in the Trustees or their successors until 338 the purchase price of the Stock and all interest accrued thereon is paid in full.

9. *Stock Dividends:* Any stock dividends which may be paid by the Company upon the Stock shall be added to and deemed to be a part of the Stock, and any cash dividends paid thereon shall be applied against the purchase price of the Stock and interest. When payment in full of the purchase price of the Stock and all interest accrued thereon shall have been made by the Participant and he shall have become entitled to the delivery thereof pursuant to the terms hereof, such stock dividends shall be delivered to the Participant at the same time that delivery is made of the Stock subscribed for hereunder. The words "stock 339 dividends paid on the Stock" or equivalent expressions when used herein shall be deemed to include stock dividends on stock received as stock dividends and stock dividends on stock purchased on the exercise of rights issued in connection with the Stock. If any recapitalization of the Company shall occur effecting a change of the Common Stock B into a different number of shares or into shares of any other class or otherwise, the shares covered by this Subscription Agreement shall be correspondingly changed into shares resulting from such change.

10. *Rights:* In the event that before delivery of the Stock to the Participant, the Company issues rights to the holders of Common Stock B to purchase any new or additional issue of stock of the Company or other stock or securities, the Trustees may, at their option, as to the rights so issued with respect to the Stock:

(a) exercise such rights and purchase the stock or other securities offered thereunder, for the benefit of the Participant, in which case the amount of purchase price payable by the Participant hereunder shall be increased by the amount of the cost of the stock or other securities purchased by the Trustees under such rights for the account
341 of the Participant, plus interest; when payment in full of the purchase price of the Stock as so increased and all interest accrued thereon, shall have been made and the Participant shall have become entitled to the delivery of the Stock pursuant to the terms hereof, such stock or other securities so purchased under such rights for the account of the Participant shall be delivered to the Participant at the same time that delivery is made of the Stock subscribed for hereunder; or

(b) sell such rights and apply the proceeds of such sale upon the purchase price of the Stock.

The Trustees may, but shall not be required to, permit the Participant to determine in each instance whether he
342 desires the rights issued with respect to the Stock exercised or sold.

The words "rights issued with respect to the Stock" or equivalent expressions when used herein shall be deemed to include rights issued with respect to stock dividends paid on the Stock and rights issued with respect to stock purchased by the Trustees on the exercise of rights issued with respect to the Stock.

The words "purchase price of the Stock" when used herein shall be deemed to refer to the purchase price as

increased as provided in subdivision (a) of this Paragraph 10.

11. *Discharge or Resignation; Default; Etc.:* In the event that

(a) prior to December 31, 1931, the connection of the Participant with the Company or any subsidiary, as the case may be, is severed by discharge either with or without cause, or resignation, or in any manner other than death, so that he is no longer in the employ of the Company or one or more of its subsidiaries, nor actively engaged in the conduct of the business; or

(b) at any time before the purchase price of the Stock 344
is paid in full default is made in the making of any payment due by the Participant or his personal representatives hereunder and such default continues for thirty days after written notice thereof is mailed to him by the Trustees by registered mail addressed to the Participant or his personal representatives at his address as set forth below his signature on the Acceptance attached hereto; or

(c) at any time before the Participant becomes entitled under the terms hereof to delivery of the certificates for the Stock, any assignment, transfer, hypothecation or pledge of, or attempt to assign, transfer, hypothecate or pledge, the Stock or any part thereof, or any stock dividends thereon or any stock or other securities purchased by the Trustees on the exercise of rights issued with re- 345
spect thereto, or any interest of the Participant therein or in this agreement, is made by or on behalf of the Participant or his personal representatives; or

(d) at any time before the Participant becomes entitled under the terms hereof to delivery of the certificates for the Stock, the Stock or any part thereof, or any stock dividends thereon, or any stock or other securities purchased by the Trustees on the exercise of rights issued

with respect thereto, or any interest of the Participant therein or in this agreement, is sold or attempted to be sold by process of law; or

(e) at any time before the Participant becomes entitled under the terms hereof to delivery of the certificates for the Stock, the Participant becomes insolvent or bankrupt; then in any such event this Subscription Agreement and all rights of the Participant hereunder shall forthwith be subject to cancellation at the election of the Trustees, to be evidenced by written notice mailed to the Participant at the address set forth below his signature on the Acceptance attached hereto, and in the event of such cancel-
347 lation the Participant shall have no further right, interest or claim of any kind hereunder, or in or to the Stock or any stock or other securities referred to herein or to which this agreement may relate, and shall not be entitled to purchase nor to the delivery of any stock or other securities hereunder, notwithstanding that there may have been paid by him or credited to him from dividends or otherwise, part or all of the purchase price of the Stock, excepting only that the Participant shall be entitled to be reimbursed by the Trustees for the amount of money, if any, which he shall have paid out of pocket to the Trustees on account of his subscription hereunder, plus interest on such amount at such rate not to exceed six per centum per annum as the Board of Directors of the Company may determine, but such reimbursement to him shall not in-
348 clude nor shall he have any right, interest or claim of any kind in or to any cash dividends on the Stock or on any stock received by the Trustees as stock dividends or purchased under rights, or in or to any other cash, stock, securities or other property which may have been or may be received by the Trustees in any manner hereunder, the rights of the Participant in the event of such cancellation being limited strictly to reimbursement of his out of pocket payments and interest thereon as aforesaid. The Trustees

may in their uncontrolled discretion waive such right of cancellation as to all or any part of the Stock subscribed for by the Participant, including stock dividends and stock or other securities purchased under rights, if any.

12. *Death:* No rights of the Participant hereunder shall survive the death of the Participant, except as expressly hereinafter provided in this Paragraph 12.

(a) In the event of the death of the Participant prior to December 31, 1931, while in the employ of the Company and/or of a subsidiary or actively engaged in the conduct of the business of the Company and/or of a subsidiary and while this agreement is in effect, his personal repre- 350
sentatives shall be entitled to purchase so much of the Stock (and a pro rata amount computed on the same ratio, of any stock dividends issued thereon and any stock or other securities purchased under rights issued with respect thereto up to and including the date of such death), as shall bear the same ratio to the total number of shares of the Stock subscribed for by him (exclusive of stock dividends issued thereon and stock or other securities purchased under rights as aforesaid) as the number of days which shall have elapsed after January 1, 1931 to the date of his death bears to three hundred and sixty-five, at a pro rata of the purchase price of the Stock subscribed for by him, determined on the same ratio (plus the cost of the pro rata amount, if any, computed on the same ratio, of stock or other securities purchased under rights issued 351
with respect to the stock, as aforesaid), with credit of any cash dividends paid on such pro rata amount of stock to such date, also determined on the same ratio, and shall be entitled to continue to make payments in the manner hereinabove provided until such purchase price of such pro rata amount of stock and any interest accrued thereon shall have been paid in full, when such personal representatives shall be entitled to receive such pro rata amount

of stock determined as aforesaid. In case such personal representatives of such deceased Participant do not desire to purchase such pro rata amount of stock, they may, within six months after such death, request the Trustees to sell such pro rata amount of stock, determined as aforesaid, at the then market price, and the proceeds of such sale (after deducting any unpaid balance of the purchase price due on such pro rata amount of stock, together with interest accrued thereon) shall be paid, if any, to such personal representatives. The personal representatives of a deceased Participant shall be conclusively presumed to have elected to purchase such pro rata amount of stock, under the foregoing provisions of this subdivision (a), 353 unless they make such request for sale within six months after the death of such Participant.

(b) In the event of the death of the Participant on or after December 31, 1931 and while this agreement is in effect, his personal representatives shall have the right to continue to make payments to the Trustees in the same manner and on the same terms applicable hereunder to the Participant during his lifetime, until the purchase price of the Stock and any interest accrued thereon shall have been paid in full, when such personal representatives shall be entitled to receive the Stock, together with any stock dividends thereon and stock or other securities purchased under rights, if any. In case the personal representatives shall not desire to continue to make such pay- 354 ments, they may, within six months after such death, request the Trustees to sell the Stock, including any stock dividends and any stock or other securities purchased under rights, if any, at the then market price, and the proceeds of such sale (after deducting any unpaid balance of the purchase price due on the Stock, together with interest) shall be paid, if any, to such personal representatives. The personal representatives of a deceased Participant shall be conclusively presumed to have elected to continue

to make such payments and to purchase the Stock under the foregoing provisions of this subdivision (b) unless they make such request for sale within six months after the death of such Participant.

13. In any case in which an amount of stock deliverable by the Trustees under this agreement or to which this agreement may at any time relate includes a fractional share, the Trustees shall have the discretionary right to adjust such fraction either by a cash payment or by sale or purchase of such fraction, or in such other manner as they in their discretion may determine.

14. The Stock subscribed for hereunder has been allotted to the Participant as additional compensation as aforesaid for services to be rendered by him, and neither this agreement nor the Stock (including any stock dividends thereon and any stock or other securities purchased by the Trustees on the exercise of rights issued in connection therewith) nor any of the rights of the Participant nor of his personal representatives hereunder, shall be subject to sale, transfer, assignment, pledge or hypothecation by him or his personal representatives until the Participant shall have become entitled to and shall actually have received delivery of the Stock certificates under the terms hereof. 356

15. The Trustees may construe any of the provisions of this Subscription Agreement, and any construction placed upon any provision hereof by the Trustees in good faith shall be binding upon the Participant and his personal representatives, and upon the Company. 357

16. In addition to any other rights of cancellation provided herein, the Trustees shall have the discretionary right at any time, at the request of the Participant or his personal representatives, to cancel the subscription here-

by evidenced in whole or in part, upon such terms as the Trustees may determine.

17. The Trustees at their option in any instance before exercising any discretion vested in them hereunder, may consult with or act upon the advice of the officers or Board of Directors of the Company, and the action of the Trustees in relying or acting upon such advice and decision shall be deemed to be an exercise of their discretion within the terms hereof.

If you desire to avail yourself of this offer, please fill
359 out and sign the acceptance of this Subscription Agreement on the enclosed duplicate, and forward the same to Guaranty Trust Company of New York, 140 Broadway, New York, N. Y., attention of Trust Department, and this Subscription Agreement and such Acceptance will thereupon constitute an agreement on the terms hereinabove set forth.

GUARANTY TRUST COMPANY OF NEW YORK,

by.....,
Vice-President.

.....,
Trustees.

360 THE AMERICAN TOBACCO COMPANY,

by.....,
Vice-President.

Exhibit G to Amended Complaint. 361

ACCEPTANCE OF SUBSCRIPTION AGREEMENT.

Guaranty Trust Company of New York,
Junius Parker,
Trustees under Agreement of
January 30, 1931. February , 1931.

Dear Sirs:

I hereby subscribe for ..... shares of the Common Stock B of The American Tobacco Company in accordance with the terms and conditions outlined in the foregoing Subscription Agreement.

Yours very truly, 362

Signature.....
Street.....
Town or City.....
State.....

SCHEDULE I.

AGREEMENT made this 30th day of January, 1931, between The American Tobacco Company, a New Jersey corporation, having an office at No. 111 Fifth Avenue, Borough of Manhattan, City and State of New York (hereinafter called the "Company"), party of the first part, and Guaranty Trust Company of New York, a corporation organized under the Banking Laws of the State of New York, having its principal office at No. 140 Broadway, Borough of Manhattan, City and State of New York (hereinafter sometimes called the "Corporate Trustee"), and Junius Parker, of 41 East 42nd Street, Borough of Manhattan, City and State of New York (hereinafter sometimes called the "Individual Trustee"), the said Guaranty Trust Company of New York and Junius Par- 363

ker and their respective successors being hereinafter sometimes collectively referred to as the "Trustees";

Whereas, the stockholders of the Company at a special meeting of stockholders held on July 28 1930, duly approved and adopted by a vote of more than two-thirds of each class of stock, an Employees' Stock Subscription Plan, and authorized, directed and empowered the President, the Board of Directors and other proper officers of the Company to take all such steps and to do any and all acts and things authorized by the terms of said Plan, as well as any and all such other acts and things as might be necessary and proper to execute and carry out the full
365 intent and purpose of the Plan and of such resolution of the stockholders, and

Whereas, by appropriate action of the Board of Directors pursuant to said Plan, an aggregate not in excess of 56,712 shares of the Common Stock B of the Company have been offered and allotted for subscription in various respective amounts to certain employees of the Company and/or its subsidiaries and to those actively engaged in the conduct of its or their business, at $25 per share, as additional compensation for services to be rendered by them to and including December 31, 1931, and

Whereas, such respective allotments are set forth in an instrument signed by the President and attested by the Secretary or an Assistant Secretary of the Company, and
366 delivered to the Trustees simultaneously with the execution and delivery of this agreement, and

Whereas, the terms and conditions upon which such stock is allotted to and may be purchased by such employees and persons actively engaged in the business are set forth in a Subscription Agreement to be executed by such individuals to whom stock is allotted and who subscribe therefor (the employees and persons actively engaged in the conduct of the business to whom stock is

allotted under said Plan and who execute said Subscription Agreement being sometimes hereinafter referred to as "Participants"), copy of which Subscription Agreement is hereto annexed marked Exhibit "A" and made a part hereof, and

Whereas, it is deemed convenient and advisable, for the purpose of executing and carrying out this Plan, that the stock so allotted for subscription under the Plan and subscribed for by Participants be in the first instance issued to and purchased by Trustees, and that a trust be created for such purpose on the terms and conditions hereinafter contained,

Now, Therefore, This Indenture Witnesseth: 368

That in consideration of the premises, the mutual covenants herein contained and of the sum of One dollar ($1.) in hand paid to each of the Trustees at or before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, the parties hereto hereby agree as follows:

1. Pursuant to the authority hereby and by the Subscription Agreement Exhibit "A" vested in them, the Trustees have negotiated a loan with and will borrow from Guaranty Trust Company of New York an amount equal to $25. per share on the number of shares of Common Stock B of the Company allotted to and subscribed for by Participants executing said Subscription Agree- 369
ments in the form set forth in Exhibit "A"; said loan will bear interest at a rate not in excess of six percentum (6%) per annum and will be evidenced by an instrument or loan agreement in form mutually satisfactory to the Trustees, the Company and said Guaranty Trust Company of New York and conforming to the provisions of this Agreement and of the Subscription Agreements, and will be secured by the shares of Common Stock B of the Com-

pany purchased by and delivered to the Trustees and referred to in paragraph 2 hereof and by the Subscription Agreement.

2. Promptly upon subscription therefor by Participants, the Company will sell and deliver to the Trustees and the Trustees will buy from the Company, at the price of $25. per share, the number of shares of Common Stock B of the Company, not in excess of an aggregate of 56,712 shares, allotted to and subscribed for, by Participants executing Subscription Agreements in the form set forth in Exhibit "A"; the funds to be used by the Trustees in making payment for said stock to be the proceeds of the
371 loan referred to in paragraph 1 hereof.

3. The Trustees hereby agree that, subject to the terms of this agreement, said shares of stock of the Company will be acquired by them as aforesaid in trust and will be held and disposed of by the Trustees pursuant to the provisions of this agreement and the Subscription Agreements with Participants, in the form Exhibit "A". The Company consents and agrees that the Trustees shall make delivery of the stock aforesaid in accordance with the terms of said Subscription Agreements in the form Exhibit "A" and in accordance with the terms of this Agreement.

372 4. The Trustees shall be empowered to borrow money for the purpose of making payment to the Company for the stock allotted to and subscribed for by Participants executing Subscription Agreements in the form of Exhibit "A", and in the event that the Company issues rights to its stockholders to purchase any new or additional issue of stock of the Company and/or other securities, the Trustees may exercise such rights and borrow additional money for such purpose. The making of the loan hereinabove referred to by the Trustees from the Guaranty Trust Com-

pany of New York is hereby ratified and approved. Any renewal of said loan or any loan made in substitution for said loan, in whole or in part, and any subsequent loan or loans may be made by the Trustees either from the Guaranty Trust Company of New York or from any other individual, firm or corporation in the discretion of the Trustees and upon such terms and conditions as to interest, maturity, security, default and otherwise, as the Trustees may from time to time in their judgment approve and agree to. The Trustees shall have authority to pledge as security for any such loan all or any part of any shares of stock then subscribed for but not paid for in full by Participants and any stock dividends paid thereon and/or any stock and/or other securities purchased under rights 374 issued in connection therewith, as well as any Subscription Agreements executed by Participants and not performed in full, but the agreement or other instrument, evidencing any such loan, shall contain appropriate provisions so that when any Participant shall have made payment in full for the stock subscribed for by him including any stock or other securities, if any, purchased under rights issued in connection with the stock subscribed for by him and becomes entitled to the delivery thereof under the terms of the Subscription Agreement executed by him, such stock and Subscription Agreement, including any stock dividends and/or stock and/or other securities, purchased under rights, to which he may be entitled, shall be subject to withdrawal from the pledge of such loan; and 375 shall also contain provisions so that any stock and/or other securities, which by reason of the death of a Participant, the cancellation of a Subscription Agreement or in any other manner whatsoever is not, under the terms of the Subscription Agreements and/or of this Agreement, to be delivered to a Participant, shall be subject to withdrawal by the Trustees from the pledge of such loan, together with any Subscription Agreement relating thereto, to the end that the Trustees may make such delivery or

376 *Exhibit G to Amended Complaint.*

disposition of any such stock and/or other securities as may be authorized under the terms of the Subscription Agreements and/or of this Agreement.

5. The Company ratifies and approves all of the terms of the Subscription Agreement in the form of Exhibit "A" hereto annexed, and agrees to be bound by the terms of all agreements in said form Exhibit "A" executed by Participants.

6. In the event that by reason of death, cancellation of a Subscription Agreement or in any other manner, any shares of stock and/or other securities acquired by the
377 Trustees under the terms hereof, either by purchase from the Company or as a stock dividend or otherwise, shall, under the terms of the Subscription Agreements and/or of this Agreement, not be deliverable to a Participant or his personal representatives, such stock and/or other securities shall be delivered by the Trustees to and accepted by the Company against payment by the Company to the Trustees of the net cost thereof to the Trustees in determining which net cost there shall (without limiting the generality of such term) be taken into account the original cost thereof and interest paid by the Trustees upon so much of any loan as is attributable to the amount of the cost thereof, and any amounts paid by the Trustees to the Participant by way of interest on out-of-pocket pay-
378 ments of such Participant repaid to him under the terms of the Subscription Agreement relating to such stock and/or other securities.

7. The Company hereby agrees to indemnify the Trustees and hold them harmless against any claim, damage or loss of any kind based on any act done by them or either of them under or in pursuance of this Agreement, or the Subscription Agreements, except in case of gross fraud or wilful misfeasance.

8. The Individual Trustee agrees to serve hereunder without commissions or compensation of any kind, all of which he hereby, on behalf of himself and his personal representatives, waives. The Corporate Trustee shall receive reasonable compensation to be paid by the Company, the amount of which shall be agreed upon between the Company and the Corporate Trustee. The reasonable expenses and disbursements of the Trustees shall be paid by the Company.

9. In the event of the death, resignation or incapacity or inability for any reason of the Individual Trustee or any successor succeeding him as Trustee under the trust, to continue in such capacity, the Company shall appoint 380
his successor. In the event of the resignation or inability for any reason to act of the Corporate Trustee or any trustee succeeding it as trustee under the trust, its successor shall be appointed by the Company. The Company may at any time remove either Trustee or any successor trustee, with or without cause, and appoint a successor to the Trustee or Trustees so removed. The removal by the Company of any Trustee or successor trustee and the appointment of a successor trustee either in the event of such a removal or in the event of the death, resignation or incapacity or inability for any reason of a trustee to continue in such capacity, shall be evidenced by resolution of the Board of Directors of the Company exercising such right of removal and/or appointment. Any Trustee or 381
successor trustee upon receiving a certified copy of a resolution of the Board of Directors of the Company exercising such right of removal and/or of appointment of a successor, shall deliver to his or its successor so appointed all certificates of stock, money, books, papers and/or property, documents and records of any kind belonging to or relating to the trust hereby created then in his or its possession or under his or its control. Every such trustee appointed in place of the Individual Trustee or his succes-

sor in the trust shall be an individual. Every such trustee appointed in place of the Corporate Trustee or its successor in the trust shall be a properly qualified bank or trust company in good standing having an office in the Borough of Manhattan, if there be such a bank or trust company willing and able to accept the trust upon reasonable and customary terms.

10. The word "Trustees" whenever used herein shall be deemed to refer to the Trustees herein named and their respective successor or successors. The term "Individual Trustee" whenever used herein shall be deemed to refer to the individual trustee named herein and any individual
383 succeeding to him as trustee hereunder. The term "Corporate Trustee" whenever used herein shall be deemed to refer to the corporate trustee named herein, and any bank or trust company succeeding to it as corporate trustee hereunder.

11. The Trustees may employ agents and attorneys in and about the performance of any of their duties hereunder or under said Subscription Agreements and shall not be answerable for the default or misconduct of any such agent or attorney appointed by them in pursuance thereof if such agent or attorney shall have been selected with reasonable care.

The Trustees may construe any of the provisions of this
384 Agreement and of the Subscription Agreements in so far as the same may appear to be ambiguous or inconsistent with any other of the provisions of either of such Agreements, and any construction so placed upon any provision hereof by the Trustees in good faith and in accordance with the advice of counsel shall be binding upon the Company and upon all Participants.

The Trustees may at any time and from time to time enter into an agreement or agreements supplemental hereto, with the Company, curing any defect or supplying any

omission in or from any of the provisions of this Agreement, and any such supplemental agreement so entered into in good faith and in accordance with the advice of counsel shall be binding upon all Participants.

The Trustees shall not be liable for any error of judgment or for any act done or steps taken or omitted by them in good faith, or for any mistake of fact or of law, or for anything which they may do or refrain from doing in connection herewith, except only for their own wilful default.

The Trustees may advise with legal counsel and any action under this Agreement taken or suffered in good faith by the Trustees in accordance with the opinion of such counsel shall be conclusive upon the Company and 386
upon Participants, and the Trustees shall be fully protected with respect thereto.

The Trustees shall incur no liability for but shall be protected with respect to any and all acts done or actions taken, suffered or omitted by them in reliance upon any notice, consent, approval, certificate, affidavit, statement or other instrument delivered to them pursuant to any of the provisions of this Agreement, or otherwise, and believed by them to be genuine, and to have been made, signed, executed, verified, certified, issued, given or delivered by the proper person or persons; and the Trustees shall be under no duty to make any investigation or inquiry as to any statement contained in any such instrument, but may accept the same as conclusive evidence of 387
the truth thereof.

The Trustees shall not be liable for any taxes, assessments or other charges whatsoever.

The Trustees shall not be responsible for the authorizing, validity or sufficiency of the title to any certificates of stock received, held or disposed of by them hereunder.

12. The trust hereby created shall continue for such time as may be necessary to accomplish the purposes for which it is created and shall in any event terminate when

all of the shares of stock allotted and subscribed for by Participants under Subscription Agreements in the form of Exhibit "A" and any stock dividends thereon and stock and/or other securities purchased under rights in connection therewith shall have been delivered to Participants and/or returned to the Company.

13. Any property, stock, securities or money remaining in the possession or under the control of the Trustees hereunder upon the termination of the trust created hereby shall be delivered and/or paid by the Trustees to the Company.

389 14. This agreement shall be binding upon and enure to the benefit of the Trustees and their respective successor and successors as such Trustees, and the Company, its successors and assigns.

In Witness Whereof these presents have been duly executed by the parties hereto the day and year first above written.

THE AMERICAN TOBACCO COMPANY,
By GEORGE W. HILL,
President.

Attest:
(Corporate Seal)
J. RAYMOND CUMMINGS,
Assistant Secretary.

390 GUARANTY TRUST COMPANY OF NEW YORK,
By M. P. CALLAWAY,
Vice-President.

Attest:
(Corporate Seal)
LEO B. BICHER,
Assistant Secretary.

JUNIUS PARKER (L. S.)

Exhibit "A" referred to in the above Trust Agreement Schedule 1 is identical with the Subscription Agreement hereinabove contained.

Exhibit H.

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ALLOTMENTS OF STOCK AT $25 A SHARE UNDER STOCK SUBSCRIPTION PLAN OF 1931

THE AMERICAN TOBACCO COMPANY

OFFICIALS

Name and Position	*Compensation for Year 1930*	*Shares Allotted*	
G. W. Hill, President of The American Tobacco Co. and American Cigar Co	$1,008,000.00	13,440	
C. A. Penn, Vice-President of The American Tobacco Co. and American Cigar Co.	602,000.00	8,025	392
A. C. Mower, Vice-President of The American Tobacco Co.	554,000.00	1,000	
C. F. Neiley, Vice-President of The American Tobacco Co.	458,000.00	3,000	
V. Riggio, Vice-President of The American Tobacco Co.	458,000.00	4,000	
T. R. Taylor, Vice-President & Auditor of The American Tobacco Co.	50,000.00	660	
J. B. Harvie, Treasurer of The American Tobacco Co.	20,000.00	260	
R. J. Boylan, Secretary of The American Tobacco Co.	20,000.00	260	
J. R. Cummings, Ass't Secretary of The American Tobacco Co.	8,000.00	100	393

THE AMERICAN TOBACCO COMPANY
NEW YORK OFFICE
AUDITING DEPARTMENT

A. P. Turner, Ass't Auditor, The American Tobacco Co.	17,500.00	160	
F. B. Reuter, Ass't Auditor, The American Tobacco Co.	12,000.00	160	

394 *Exhibit H to Amended Complaint.*

Name and Position	*Compensation for Year 1930*	*Shares Allotted*
H. P. Cunningham, Ass't Auditor, The American Tobacco Co.....	14,000.00	160
J. R. Coon, Manager, Statistical and Tax Department.....	8,500.00	110
R. H. Clay, Clerk, Leaf Department	6,500.00	50
L. W. Davison, Buyer, Purchasing Department.....	6,600.00	50
J. M. Byrne, Buyer, Purchasing Department.....	6,600.00	50
W. A. Shevlin, Department Head, New York Office.....	4,400.00	40
395 C. W. Bushnell, Manager, Filing Department.....	4,200.00	40
L. L. Ashmead, Ass't to Manager, Insurance Dept.....	5,800.00	40
T. P. Connors, Clerk, Traffic Department.....	3,316.00	35
J. H. Garrick, Clerk.....	3,000.00	25
J. J. Snyder, Clerk.....	3,400.00	25
W. P. Corbett, Clerk.....	3,900.00	25
J. J. O'Keefe, Manager, Insurance Department.....	11,000.00	50
R. H. Fletcher, Credit Manager....	8,000.00	100
W. E. Witzleben, Manager, Advertising Department.....	12,500.00	160
396 W. E. Lewis, Manager, Salesmen's Department.....	7,800.00	100
L. S. Jones, Buyer, Purchasing Department.....	5,800.00	40
P. Mallgraf, Buyer, Purchasing Department.....	5,000.00	35
C. Bedell, Clerk.....	3,500.00	25
J. Bishop, Clerk.....	3,400.00	25
V. Canale, Clerk.....	2,950.00	25
G. L. Diener, Clerk.....	4,200.00	30

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Exhibit H to Amended Complaint.

Name and Position	*Compensation for Year 1930*	*Shares Allotted*
A. F. Fitzpatrick, Clerk	4,000.00	30
S. Hawkins, Clerk	2,700.00	30
E. Hester, Manager, Deal Department	4,200.00	50
J. Jaeger, Clerk	5,000.00	40
W. R. Journeay, Clerk	3,300.00	25
Ed. Randall, Clerk	3,050.00	20
Wm. Ross, Clerk	3,750.00	50
J. S. Rubin, Clerk	2,600.00	20
H. Shaffeld, Clerk	3,800.00	30
W. R. Settgas, Clerk	3,420.00	30
A. H. Seykora, Manager, Mailing Department	2,500.00	15
J. G. Wall, Clerk	3,700.00	30
A. H. White, Manager, Export & Import Department	6,000.00	40
J. Carney, Clerk	2,800.00	25
K. Kennedy, Clerk	2,704.00	30
G. Schildknecht, Manager, Order Department	3,800.00	25
T. T. Harkrader, Traffic Manager	16,000.00	210
M. T. Barnes, Secretary	3,000.00	40
A. F. Bowden, Secretary	3,000.00	40
M. M. Baker, Secretary	3,000.00	40
H. M. Sheridan, Secretary	3,000.00	40
L. McCarthy, Nurse	2,400.00	25
M. L. McMahon, Manager, Stenographic Bureau	2,700.00	35
M. E. Gordon, Secretary	3,000.00	40

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THE AMERICAN TOBACCO COMPANY
BRANCH OFFICES—AUDITING DEPARTMENT

R. E. Elmore, Cashier, Durham Branch	8,000.00	80
L. P. Crabtree, Ass't Cashier, Durham Branch	3,200.00	30

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Name and Position	*Compensation for Year 1930*	*Shares Allotted*
W. H. Curtis, Auditor, The American Tobacco Co. of the Pacific Coast	5,500.00	55
J. S. Murphy, Office Manager, St. Louis Depot	5,500.00	55
E. B. Taylor, Secretary, Nashville Tobacco Works	2,900.00	20
Cosmo Cambria, Clerk, St. Louis Depot	3,400.00	20
W. W. Dunlop, Ass't to Auditor, San Francisco Office	3,800.00	30
401 G. H. Helmus, Cashier, Reidsville Branch	5,300.00	50
R. R. Ratcliffe, Ass't Cashier, Reidsville Branch	3,300.00	25
R. W. Phillips, Cashier, Virginia Branch	4,400.00	40
G. W. Bartlam, Ass't Cashier, Virginia Branch	2,500.00	20
Emil Christian, Cashier, Louisville Branch	4,800.00	50
John C. Malone, Second Man in Office, Louisville Branch	3,600.00	20
C. R. Lawson, Cashier, Richmond Branch	4,200.00	30
402 J. A. Kelly, Second Man, Durham Branch	3,300.00	30

THE AMERICAN TOBACCO COMPANY
SALES DEPARTMENT

F. S. Caldwell, Sales Manager	10,500.00	100
H. E. Bahls, Sales Manager	9,000.00	100
A. L. Serna, Sales Manager	12,500.00	165
R. F. Griffith, Sales Manager	12,000.00	160
O. W. Peaslee, Sales Manager	20,000.00	260

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Name and Position	*Compensation for Year 1930*	*Shares Allotted*	
W. J. Naber, Division Manager....	7,200.00	75	
W. A. Murphy, Division Manager..	3,900.00	40	
D. J. McCarthy, Division Manager.	2,392.00	25	
J. H. Edmonds, Division Manager..	2,912.00	25	
J. O. Melvin, Division Manager....	3,562.00	30	
B. E. Dupre, Division Manager....	3,640.00	35	
M. Lemberg, Division Manager....	5,060.00	45	
P. S. Launsback, Division Manager	2,392.00	25	
R. D. Seaman, Division Manager...	2,288.00	20	
L. M. Applewhite, Division Manager	2,652.00	20	
C. J. Klos, Division Manager.....	3,874.00	30	
E. N. Deam, Division Manager.....	2,236.00	20	404
R. P. MacNeil, Division Manager...	3,484.00	25	
O. G. Zemann, Field Sales Manager	5,500.00	40	
A. L. Banning, Field Sales Manager	4,296.00	30	
G. E. Davis, Field Sales Manager..	5,000.00	30	
C. Finney, Division Manager.....	3,944.00	20	
E. P. Drexler, Division Manager...	4,056.00	20	
C. E. Thompson, Division Manager.	4,269.00	20	
R. Hicks, Division Manager.....	3,987.00	20	
J. Vander Molen, Division Manager	3,432.00	20	
P. C. Fritsch, Division Manager....	3,937.00	20	
R. D. Zieme, Division Manager....	3,545.00	20	
F. Boston, Division Manager.....	3,172.00	20	
D. D. Dickinson, Division Manager	2,548.00	15	
L. C. Mallough, Division Manager..	2,912.00	15	
S. J. Russell, Division Manager....	3,389.00	15	405
A. H. Hahus, Division Manager....	2,457.00	15	
F. H. Jabusch, Division Manager..	3,224.00	15	
H. E. Taintor, Division Manager...	2,600.00	10	
A. T. Rowland, Division Manager..	2,236.00	10	
J. H. Crute, Field Sales Manager..	4,200.00	35	
W. P. Branch, Field Sales Manager	5,500.00	45	
R. O. Rockwood, Field Sales Manager	6,140.00	45	

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Name and Position	*Compensation for Year 1930*	*Shares Allotted*
L. F. Stahler, Division Manager...	3,900.00	25
B. G. Phillips, Division Manager...	3,796.00	25
B. S. Howard, Division Manager...	3,276.00	20
R. A. Perkinson, Division Manager.	3,120.00	20
W. F. Settle, Division Manager....	1,872.00	15
H. J. Holmes, Division Manager...	3,722.00	20
C. Y. Allison, Division Manager...	4,696.00	25
G. H. Curry, Division Manager....	2,548.00	15
M. A. Tuck, Division Manager.....	2,652.00	15
R. C. Jones, Division Manager.....	2,600.00	15
H. C. Turner, Division Manager...	2,444.00	15
407 E. B. Acuff, Division Manager.....	2,132.00	15
W. L. Locker, Division Manager...	3,215.00	20
W. F. DeBardeleben, Division Manager.....	3,448.00	20
E. M. Wrenn, Division Manager...	2,652.00	15
H. A. Hooss, Field Sales Manager..	4,575.00	45
J. B. Kerbo, Field Sales Manager..	7,500.00	75
J. L. Rogers, Division Manager....	4,056.00	35
H. H. Finley, Division Manager....	2,808.00	20
M. B. Lundberg, Division Manager.	4,900.00	35
C. C. Flatley, Division Manager....	4,056.00	25
F. A. Noll, Division Manager.....	3,796.00	25
W. L. McDuffey, Division Manager.	4,108.00	25
C. T. Meredith, Division Manager..	3,744.00	40
H. L. Sanders, Division Manager...	3,666.00	40
408 W. J. Chaffin, Division Manager...	3,892.00	40
A. E. Cline, Division Manager.....	3,900.00	40
W. F. Broeker, Division Manager..	3,536.00	40
D. E. Reaves, Division Manager....	2,288.00	20
J. C. Pridey, Division Manager....	1,820.00	20
J. E. Bryan, Division Manager....	3,536.00	25
C. R. Doran, Division Manager....	2,912.00	20
D. E. Baird, Division Manager.....	5,663.00	50
C. J. Gaupp, Division Manager....	5,168.00	50
E. G. Jefferies, Division Manager..	5,443.00	50

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Name and Position	*Compensation for Year 1930*	*Shares Allotted*
T. E. Pearson, Division Manager...	4,420.00	40
A. M. Reilly, Division Manager....	4,136.00	40
W. W. Durfee, Division Manager...	3,380.00	35
C. L. Colebuen, Division Manager..	4,000.00	35
E. M. Shields, Division Manager...	3,640.00	35
F. W. Whaley, Division Manager...	3,640.00	35
C. J. Plaisance, Division Manager..	4,160.00	35
C. H. Clay, Division Manager.....	3,900.00	35
J. K. Fletcher, Ass't to V. Riggio..	20,000.00	260
W. H. Frank, Special Representative.....	8,000.00	100
O. V. Richards, in charge of Lucky Strike Radio Advertising.....	4,500.00	50
E. Mehr, Manager, Turkish Cigarette Dept.....	5,500.00	50
A. Harris, charge of Private Brand Dept.....	5,500.00	40
A. Patterson, in charge of Blue Boar and other High Grade Tobacco Brands.....	7,000.00	75

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THE AMERICAN TOBACCO COMPANY
DEPARTMENT OF MANUFACTURE

J. A. Crowe, Ass't to Mr. C. F. Neiley, Vice-Pres.....	14,000.00	187
J. J. Fitzgerald, Clerk, Manufacturing Department.....	4,500.00	60
Miss M. A. Devlin, Secretary to Mr. C. F. Neiley, Vice-President.....	3,000.00	40

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412 *Exhibit H to Amended Complaint.*

THE AMERICAN TOBACCO COMPANY
FACTORY BRANCH MANAGERS
CHEMICAL RESEARCH

Name and Position	*Compensation for Year 1930*	*Shares Allotted*
W. H. Ogsbury, Branch Manager, Durham Branch	18,000.00	240
C. H. Gibson, Branch Manager, Virginia Branch	15,000.00	200
W. H. Boyd, Branch Manager, Reidsville Branch	10,000.00	130
R. H. Moorman, Branch Manager, Richmond Branch	10,000.00	130
413 J. G. Hager, Branch Manager, Louisville Branch	17,000.00	150
A. L. Chesley, Chief Chemist	10,000.00	130

THE AMERICAN TOBACCO COMPANY
CHEMICAL DEPARTMENT
RICHMOND, VA.

H. R. Hanmer, Assistant Chemist	3,900.00	50
C. E. Brogden, Assistant Chemist	2,700.00	35
W. R. Harlan, Chemist	3,600.00	30
R. P. Hudson, Chemist	2,600.00	25
R. R. Chesson, Chemist	2,600.00	25
J. A. Bradford, Chemist	2,600.00	25
John L. Hilberg, Superintendent	5,600.00	50
414 Richard L. Adams, Assistant Superintendent	3,200.00	30
Bryan L. Clark, Foreman	2,080.00	20
James I. Lynch, Foreman	1,820.00	20
Phillip B. Schenk, Foreman	2,340.00	25
John H. LeMay, Foreman	2,184.00	15
Clifford S. Moredock, Foreman	1,820.00	15
William Jones, Assistant Foreman	1,300.00	10
Frederick Marlow, Assistant Foreman	1,170.00	10

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Name and Position	*Compensation for Year 1930*	*Shares Allotted*
Hugh H. Hiter, Purchasing Agent..	3,120.00	20
Henry C. Van Brackle, charge Shipping and Receiving.....	1,664.00	10
Charles R. Barnes, Master Mechanic	2,496.00	20
Nicholas H. Whalen, Electrician...	2,080.00	10

THE AMERICAN TOBACCO COMPANY
LOUISVILLE BRANCH
LOUISVILLE, KY.

J. G. Hager, Jr., Assistant Branch Manager.....	4,000.00	50
E. R. Sullivan, Superintendent Long Cut..... 416	5,000.00	50
J. H. Yenawine, Superintendent Long Cut.....	5,500.00	25
Fred T. Blunt, Superintendent Plug	4,000.00	35
James Kelty, Foreman Plug.....	2,860.00	25
L. L. Guernsey, charge Stemmery..	2,000.00	20
W. J. Ryan, Traffic, Trucking, Shipping.....	4,800.00	35
C. H. Kissinger, Foreman, Long Cut	2,080.00	15
Frank Eyl, Foreman, Long Cut....	1,950.00	20
George Bowman, Assistant Foreman, Long Cut.....	1,560.00	15
Andrew Yost, Foreman Plug.....	1,560.00	15
Otto Oster, Foreman, charge Receiving..... 417	1,820.00	15
John Buechle, Foreman Plug.....	1,820.00	15
John Clemens, Foreman Plug.....	1,820.00	20
William Young, Foreman.....	2,080.00	15
Albert John Strehlow, Foreman Printing Department.....	2,600.00	15
William Miller, Head Mechanic....	2,860.00	30
E. H. Drury, Engineer.....	2,496.00	25
Dr. Wilbur Helmus, Head Medical Department.....	6,000.00	25

THE AMERICAN TOBACCO COMPANY
NASHVILLE TOBACCO WORKS
NASHVILLE, TENN.

Name and Position	*Compensation for Year 1930*	*Shares Allotted*
J. P. LeSueur, Manager	5,000.00	40
W. G. Lewis, Superintendent	4,200.00	40

THE AMERICAN TOBACCO COMPANY
VIRGINIA BRANCH
RICHMOND, VA.

	E. R. Fuhrman, Assistant Branch Manager	7,000.00	90
419	James McFadden, Superintendent	4,400.00	25
	L. E. Downs, Assistant Superintendent	5,000.00	60
	C. C. Pittman, Assistant Superintendent	5,000.00	60
	Oscar Kent, Master Mechanic	3,500.00	30
	W. M. Haddon, Assistant to Master Mechanic	2,496.00	15
	John Brosnan, Head Foreman, Making Department	3,016.00	30
	J. M. Gibson, Machine Foreman	2,500.00	25
	H. M. Pedigo, Head Foreman, Packing Department	2,470.00	25
	James A. Owens, Foreman	2,470.00	25
420	M. J. Bradley, Foreman	2,470.00	25
	H. F. Primrose, Foreman	2,600.00	25
	N. V. Boyd, Head Foreman	2,496.00	25
	W. H. Dillon, Assistant Foreman	2,210.00	15
	W. L. Duke, Assistant Foreman	2,340.00	15
	H. B. Goulder, Assistant Foreman	2,080.00	15
	Oscar Jennings, Foreman	1,820.00	15
	H. L. Chaney, Foreman	2,288.00	15
	W. A. Farmer, Foreman	1,872.00	15

Exhibit H to Amended Complaint. 421

Name and Position	*Compensation for Year 1930*	*Shares Allotted*
W. W. Farmer, Foreman, Machine Shop	2,600.00	20
C. J. Teeter, Chief Electrician	2,496.00	15
R. H. Wills, Stock Clerk and Purchasing Agent	1,716.00	15
W. T. Kidd, Foreman	1,976.00	15
James Hunter, Foreman	1,573.00	15
G. C. Newcomb, Traffic Manager	2,756.00	35
J. P. Spearman, Superintendent	6,000.00	50
Wm. S. Congalton, Foreman	2,652.00	15
Frank Bowles, Foreman	2,652.00	15
Dr. Wm. H. Parker, Physician-in-charge	2,000.00	50

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THE AMERICAN TOBACCO COMPANY
DURHAM BRANCH
DURHAM, N. C.

P. L. Fowler, Assistant Branch Manager	7,500.00	75
W. Clark Lea, Superintendent Lucky Strike	6,000.00	50
A. T. Gibbons, Superintendent Turkish	7,000.00	50
D. J. Anderson, Assistant Superintendent Turkish	5,200.00	40
J. B. Waddell, Assistant Superintendent Lucky Strike	2,600.00	25
Earle Long, Foreman Casing	2,600.00	25
J. V. Barnhardt, Foreman Making and Packing	2,080.00	20
P. D. Goodwyn, Foreman Making and Packing	1,820.00	20
W. C. Slater, Foreman Making and Packing	2,444.00	20
H. N. Franck, Foreman Making and Packing	3,300.00	25

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424 *Exhibit H to Amended Complaint.*

Name and Position	*Compensation for Year 1930*	*Shares Allotted*
Benjamin Saitta, Foreman Turkish Leaf	2,964.00	25
W. A. Matthews, Foreman Making and Packing	3,120.00	25
J. H. King, Foreman Making and Packing Turkish	3,000.00	25
V. B. Lougee, Foreman Making and Packing Turkish	2,496.00	25
John A. Johnson, Foreman, Cutting	3,100.00	20
C. T. Crabtree, Foreman Machine Shop	3,120.00	25
425 S. S. Little, Assistant Chief Mechanic	2,288.00	20
Ernest Tyrene, Chief Mechanic	3,900.00	30
Louis Zeigler, Foreman Shipping	3,700.00	35
W. B. de Vault, Foreman Shipping	2,700.00	25
Alphonse Falardeau, Foreman Export Department	2,860.00	25
Thomas Clark, Bull Cutting	1,560.00	15
W. L. Wilkerson, Foreman Bull Packing	2,080.00	15
Samuel J. Algranti, Foreman Wrapping Stock	3,500.00	30
T. C. Markham, Foreman Wrapping	4,200.00	40
B. H. Smith, Superintendent Bull.	3,600.00	40
426 George Hammock, Chief of Construction	3,380.00	40
Peter Pederson, Chief Engineer	3,380.00	30
Dr. Schuler, Head of Medical Department	2,400.00	25

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THE AMERICAN TOBACCO COMPANY
REIDSVILLE BRANCH
REIDSVILLE, N. C.

Name and Position	*Compensation for Year 1930*	*Shares Allotted*	
Edrington S. Penn, Assistant Branch Manager	3,000.00	40	
F. E. Kailer, Superintendent	6,000.00	40	
J. R. Maxwell, Chief Engineer	4,500.00	60	
William Nichols, Superintendent	5,500.00	50	
H. M. Mobley, Assistant Superintendent	3,960.00	40	
Wm. B. Young, Stock Clerk	3,660.00	35	
R. L. King, Shipping Clerk	3,120.00	30	428
Henry D. Knight, Engineer	3,300.00	25	
Roy Norman, Foreman	2,860.00	20	
S. W. Siddle, Foreman	2,760.00	20	
Joe M. Gilmore, Foreman	2,756.00	20	
B. W. Strader, Foreman	2,756.00	20	
E. P. Walker, Foreman Machine Shop	2,750.00	20	
J. F. Claybrook, Foreman	2,700.00	20	
J. H. McAdams, Foreman	2,600.00	20	
Bess S. Hardy, Nurse	2,400.00	15	
T. R. Brooks, Foreman Little Cigar	2,496.00	20	
G. C. Burton, Foreman	2,340.00	20	
R. W. Gentry, Foreman	2,340.00	20	
C. E. Stanfield, Foreman	2,210.00	20	
W. E. Wray, Foreman Machine Shop	2,184.00	20	429
J. J. Hyler, Foreman Little Cigar	2,132.00	10	
T. S. Boyd, Foreman	1,820.00	20	
J. D. Gregory, Foreman	2,080.00	20	
J. R. Newman, Foreman	2,760.00	20	
J. B. Walker, Mechanic	2,860.00	35	
Earl H. Blackburn, Foreman	2,760.00	20	
Benton Setliffe, Foreman	1,820.00	15	

430 *Exhibit H to Amended Complaint.*

Name and Position	*Compensation for Year 1930*	*Shares Allotted*
G. M. McWhorter, Foreman.....	1,985.00	20
J. R. Mobley, Foreman.....	1,560.00	15
Dr. S. G. Jett, Head Medical Department.....	5,500.00	50
AMERICAN SUPPLIERS, INC.		
J. E. Lipscomb, President.....	50,000.00	665
D. W. Brashear, Vice-President....	21,000.00	250
William F. Burch, charge Turkish Leaf in United States.....	8,500.00	100
J. F. Strickland, Manager.....	17,000.00	220
431 J. S. Dowd, Manager.....	17,000.00	220
J. R. Hutchings, Supervisor.....	6,500.00	85
W. A. Armitage, Supervisor.....	6,500.00	65
R. W. Sands, Supervisor.....	5,500.00	65
T. G. Holman, Supervisor.....	7,500.00	65
C. R. Skinner, Supervisor.....	8,500.00	60
C. R. Holman, Supervisor.....	6,000.00	60
A. C. Stallings, Supervisor.....	9,000.00	50
C. L. Gary, Supervisor.....	6,500.00	60
F. M. Phillips, Head Buyer.....	4,300.00	50
F. J. Medley, Buyer.....	3,600.00	45
G. L. Turner, Resident Manager...	4,800.00	50
T. A. Duke, Resident Manager.....	6,000.00	50
H. A. Turner, Head Buyer.....	3,600.00	35
432 E. R. Barkley, Head Buyer.....	3,600.00	35
M. H. Turner, Head Buyer.....	4,000.00	35
C. W. Snead, Buyer.....	3,400.00	35
J. S. Early, Head Buyer.....	3,500.00	35
A. P. Boswell, Buyer.....	3,200.00	35
B. W. Owen, Buyer.....	4,200.00	35
R. B. Williams, Assistant Manager.	3,400.00	35
R. C. Stokes, Jr., Resident Manager and Buyer.....	4,700.00	50
M. O. Clayton, Buyer.....	3,800.00	30

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Name and Position	*Compensation for Year 1930*	*Shares Allotted*	
T. P. Smith, Head Buyer.....	4,000.00	30	
W. C. Clay, Buyer.....	3,300.00	30	
L. J. Allen, Buyer.....	3,400.00	30	
L. J. Doerhoefer, Buyer.....	3,850.00	30	
A. H. Williams, Buyer.....	2,400.00	30	
M. S. Swart, Buyer.....	3,300.00	30	
J. E. Donnelly, Buyer.....	3,000.00	30	
H. P. Montgomery, Buyer.....	3,000.00	30	
T. B. Roberts, Head Buyer.....	3,400.00	30	
C. D. Poindexter, Buyer.....	3,300.00	30	
O. L. Hull, Buyer.....	3,300.00	30	
H. D. Laughinghouse, Buyer.....	2,400.00	30	434
J. L. Gordon, Buyer.....	3,100.00	30	
Stuart Neiley, Buyer.....	2,600.00	30	
F. W. Laws, Buyer.....	2,400.00	30	
C. T. Randolph, Buyer.....	2,200.00	20	
J. C. Fleming, Buyer.....	3,600.00	20	
W. R. Emerson, Buyer.....	2,600.00	20	
Ben Vernon, Buyer.....	2,400.00	20	
F. M. Boring, Buyer.....	2,200.00	20	
J. T. Griffin, Buyer.....	2,700.00	20	
L. V. Smith, Buyer.....	3,300.00	20	
M. B. Morton, Buyer.....	3,000.00	20	
W. L. Israel, Buyer.....	3,300.00	20	
O. S. Antell, Buyer.....	3,000.00	20	
S. A. Worsely, Prizery and Buyer..	2,400.00	20	
S. G. Motley, Buyer.....	2,600.00	20	435
A. B. Noell, Head Buyer.....	3,900.00	20	
B. H. Smith, Jr., Buyer.....	3,000.00	20	
W. R. Reade, Buyer.....	2,400.00	20	
J. R. Neely, Buyer.....	2,600.00	20	
R. M. Kirkland, Buyer.....	3,200.00	20	
C. W. Lea, Jr., Buyer.....	2,900.00	20	
W. W. Davis, Buyer.....	2,200.00	20	
C. C. Settles, Buyer.....	2,600.00	20	
A. W. Glasser, Buyer.....	2,600.00	20	

436 *Exhibit H to Amended Complaint.*

Name and Position	*Compensation for Year 1930*	*Shares Allotted*
T. M. Moran, Buyer	2,600.00	20
J. S. Latham, Buyer	2,400.00	20
C. S. Manning, Buyer	2,200.00	20
B. C. King, Buyer	2,400.00	20
E. E. Buster, Buyer	2,500.00	20
E. F. Walker, Buyer	2,200.00	20
R. E. Mitchell, Buyer	2,500.00	20
W. B. Leftwich, Factory Superintendent	4,500.00	40
W. J. Moredock, Redryer	3,000.00	30
G. W. Garner, Factory Superin-		
437 tendent	4,000.00	35
I. T. Bendall, Factory Superintendent	2,800.00	25
D. E. Ward, Factory Superintendent	2,800.00	25
A. Gillespie, Factory Superintendent	2,200.00	25
F. W. Smith, Factory Superintendent	2,600.00	25
L. W. Bennett, Foreman	1,800.00	20
R. L. Boring, Assistant Superintendent	2,400.00	20
Thomas Prewitt, Assistant Superintendent	1,820.00	20
H. T. Carter, Buyer	2,400.00	20
438 R. C. Beasley, Buyer	3,000.00	40
D. B. Strange, Buyer	3,400.00	45
G. C. McFarland, Buyer	2,600.00	35
R. P. Walker, Jr., Assistant Manager	8,500.00	110
W. M. McChesney, Superintendent.	4,600.00	60
R. E. Thomas, Superintendent	3,500.00	30
G. C. Duke, Foreman	3,300.00	25
H. H. King, Foreman	2,700.00	20

Exhibit H to Amended Complaint. 439

Name and Position	*Compensation for Year 1930*	*Shares Allotted*	
M. B. Kirkland, Foreman	2,600.00	20	
A. F. Bullock, Foreman	2,400.00	20	
Edwin Johnson, Foreman	2,600.00	20	
C. H. Garrison, Superintendent	6,000.00	60	
W. V. Turner, Jr., Assistant Superintendent	3,000.00	40	
I. G. Crutchfield, Foreman	2,580.00	20	
H. H. Dodson, Foreman	2,400.00	20	
O. W. Leath, Foreman	2,040.00	20	
C. W. Covington, Foreman	2,184.00	20	
J. W. Williams, Superintendent	3,300.00	40	
S. C. Mimms, Foreman	2,700.00	25	440
John H. Gregory, in charge Bonded			
C. L. Firesheets, Cashier	4,100.00	30	
Warehouse, Durham	4,800.00	60	
Edward N. Cheek, in charge Bonded			
Warehouse, Richmond	3,800.00	50	
Robert B. Porter, in charge Bonded			
Warehouse, Reidsville	2,400.00	30	

AMERICAN SUPPLIERS, INC.

AUDITING DEPARTMENT

D. M. Connor, Cashier	5,000.00	50	
George S. Bouse, Cashier	3,200.00	40	
J. S. Woolfolk, Cashier	3,500.00	35	
R. R. Steele, Cashier	3,000.00	35	441
R. M. Nelson, Cashier	3,000.00	30	
J. C. Roberts, Clerk	3,400.00	35	
S. T. Wilder, Clerk	3,300.00	35	
J. T. Ellis, Cashier	4,800.00	60	
T. W. Blanton, Assistant Cashier	3,300.00	20	

442 *Exhibit H to Amended Complaint.*

AMERICAN CIGAR COMPANY

SALES DEPARTMENT

Name and Position	*Compensation for Year 1930*	*Shares Allotted*
R. J. McCreight, Sales Manager....	7,500.00	100
F. E. Wayne, Sales Manager.....	8,000.00	75
T. Vinci, Sales Manager.....	7,000.00	75
W. F. Riker, Sales Manager.....	6,500.00	75
L. J. Butcher, Sales Manager.....	7,000.00	75
R. W. Schafhirt, Ass't Sales Manager.....	5,000.00	40
T. E. Thompson, Ass't Sales Man-		
443 ager.....	4,160.00	40
W. H. Canfield, Ass't Sales Manager.....	5,500.00	50
R. B. Swartley, Ass't Sales Manager.....	5,720.00	50
R. H. Kemna, Ass't Sales Manager.	5,343.00	50
W. J. McGuiness, Ass't Sales Manager.....	4,680.00	40
P. J. Wood, Ass't Sales Manager...	5,000.00	40
T. J. O'Connell, Ass't Sales Manager.....	5,500.00	45
A. P. Simmonds, Ass't Sales Manager.....	5,500.00	45
H. Roskind, Ass't Sales Manager...	5,500.00	40
J. R. Eddie, Ass't Sales Manager...	2,700.00	25
444 B. M. McDearman, Ass't Sales Manager.....	4,000.00	30
J. H. Coffman, Ass't Sales Manager	3,900.00	30
R. C. Gravlee, Ass't Sales Manager.	2,900.00	25
O. N. Hahn, Ass't Sales Manager...	5,000.00	40
E. Newberry, Ass't Sales Manager.	6,600.00	50
W. N. Davis, Ass't Sales Manager..	3,620.00	30
H. G. Porter, Ass't Sales Manager.	6,000.00	30
R. D. Worthy, Ass't Sales Manager	3,120.00	30

Exhibit H to Amended Complaint. 445

AMERICAN CIGAR COMPANY

NEW YORK OFFICE

Name and Position	*Compensation for Year 1930*	*Shares Allotted*
P. H. Gorman, Vice-President.....	48,000.00	250
S. Schou, Treasurer.....	9,700.00	25
Geo. Bolivar, Secretary.....	6,000.00	25
E. A. Harvey, Auditor.....	18,000.00	240
C. Ganshow, Assistant Auditor....	9,000.00	120
F. V. Riggio, Director of Sales.....	20,000.00	260
W. H. McGrade, Assistant to Auditor, in charge of Office.....	5,000.00	40
A. H. Gregg, Sales Manager of Havana High Grade Dept.....	24,000.00	200
T. C. Gales, Ass't of Havana High Grade Department.....	12,000.00	75
J. P. Connell, Ass't to Vice-President.....	15,000.00	200
W. H. Jefferson, Ass't to Mr. P. H. Gorman.....	15,000.00	125
F. C. Niles, Sales Department.....	12,000.00	100
H. La Verge, Buyer.....	18,000.00	200
J. B. Field, Tax Department.....	5,500.00	40
A. E. Ohlson, Head of Order Department.....	7,000.00	40
L. S. Houston, President of Cuban Tobacco Co.....	25,000.00	200
J. H. Stahl, Head of Advertising Dept.....	6,000.00	40
J. J. Cleary, Clerk.....	3,500.00	25

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AMERICAN CIGAR COMPANY

BRANCH CASHIERS

W. M. Green, Kansas City Branch.	2,860.00	25
H. E. Mahoney, Louisville Branch..	4,200.00	30
J. W. Dale, Camden Branch.....	3,200.00	25

448 *Exhibit H to Amended Complaint.*

Name and Position	*Compensation for Year 1930*	*Shares Allotted*
C. J. Gaynor, Passaic Branch.....	2,700.00	25
E. J. Roach, Trenton Branch.....	3,600.00	25
J. J. Sheridan, Philadelphia Branch	3,600.00	25
J. E. York, Charleston Branch....	3,200.00	25
AMERICAN CIGAR COMPANY		
LEAF DEPARTMENT CASHIERS		
L. W. Persons, Sparta Branch.....	3,000.00	20
C. D. Forbes, Hartford Branch....	3,600.00	25
J. W. Dowman, Norfolk Branch...	3,300.00	25
449 W. Frame, Zenia Branch.....	2,600.00	15
AMERICAN CIGAR COMPANY		
GENERAL BOOKS DEPARTMENT		
Marvin K. Decker, Traveling Auditor.....	3,500.00	45
J. F. Dillon, Head Gen'l Books....	4,000.00	35
S. Goldwasser, in charge of Branch Details.....	3,000.00	25
AMERICAN CIGAR COMPANY		
BRANCH MANAGER		
A. Gold, Trenton Branch.....	10,000.00	80
450 Maxwell Kunis	6,500.00	50
J. Rosenbluth, Camden Branch....	6,000.00	60
J. E. Schneider, Charleston Branch	6,200.00	50
J. Mandel, Philadelphia Branch...	6,000.00	60
H. G. Berry, Ass't Manager.....	4,500.00	35
A. G. Woodford, Manager Louisville Branch.....	6,000.00	50
S. C. Newsome, Ass't Manager.....	3,900.00	35
C. G. Maxwell, Louisville.....	5,400.00	70

Exhibit H to Amended Complaint. 451

Name and Position	*Compensation for Year 1930*	*Shares Allotted*
J. P. Reif, Chief Clerk, Manufacturing Dept	3,500.00	20
J. A. Johenning, Ass't Chief Clerk, Manufacturing Department	3,000.00	15
AMERICAN CIGAR COMPANY		
LEAF DEPARTMENT		
E. J. Halpin, Manager	9,000.00	75
W. B. Fanshaw, Manager	6,600.00	50
W. A. Banker, Manager	5,000.00	30
C. W. Smith, Manager	5,000.00	30
C. G. Serns, Leaf Buyer	5,000.00	30
K. Ledbetter, Manager	4,200.00	30
E. E. Baxwell, Manager	4,200.00	25
W. M. Miller, Ass't Manager	2,080.00	15
A. B. Williams, Ass't Manager	3,480.00	25
A. F. Burnham, Leaf Buyer	5,000.00	25
I. G. Wagner, Leaf Buyer	5,000.00	30
Stoley Nelson, Leaf Buyer	4,200.00	25
Manuel Llano, Havana Leaf Department	7,500.00	40
H. H. Hurt, Chief Clerk	5,400.00	25
PORTO RICAN LEAF TOBACCO COMPANY		
E. S. Steele, Jr., Vice-President & Treasurer	15,000.00	75
F. R. Touton, Vice-President	15,000.00	75
F. G. Roman, Assistant Secretary	5,000.00	25
J. E. Munoz, Assistant Auditor	4,200.00	20
THE AMERICAN TOBACCO COMPANY OF THE ORIENT		
R. H. Kuhn, Assistant Managing Director	15,000.00	200
J. M. English, Branch Manager	12,000.00	150

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454 *Exhibit H to Amended Complaint.*

Name and Position	*Compensation for Year 1930*	*Shares Allotted*
J. Avramidi, Branch Manager.....	11,700.00	125
O. D. Baxalys, Branch Manager...	9,300.00	100
P. Persinachi, Managing Director..	25,000.00	330
E. E. Hundley, Branch Manager...	10,000.00	125
Seid. Youssouf, Head Buyer.....	10,000.00	75
G. M. Craig, Assistant Branch Manager	7,500.00	60
U. Marraccini, Engineer.....	7,000.00	50
C. A. Haydn, Traveling Auditor...	6,000.00	40
J. H. Lane, Assistant Manager....	5,700.00	50
M. Kritikos, in charge manipula-		
455 tion.....	7,680.00	50
J. Dimou, Branch Manager.....	5,700.00	40
W. Gout, Cashier.....	5,400.00	40
J. Monferrato, Branch Manager...	5,220.00	35
G. Gregoriades, Branch Manager...	4,980.00	35
P. Papadimitriou, Branch Manager	4,890.00	35
W. L. Houghton, Cashier.....	4,300.00	30
E. W. Haydn, Cashier.....	4,200.00	30
D. R. Field, Assistant Branch Manager	4,800.00	50
A. C. Lindley, Branch Manager....	4,800.00	50
E. Gout, Cashier.....	3,480.00	25
J. Gout, Cashier.....	3,180.00	20
W. B. Millner, Jr., Assistant Branch		
456 Manager	3,000.00	30
C. Ullman, Cashier.....	1,750.00	20

THE AMERICAN TOBACCO COMPANY
SUBSIDIARY COMPANY

PAPETERIES DE MAUDUIT

F. H. Stafford, Manager.....	42,000.00	560
Jean Fournier, Assistant Manager.	10,400.00	135

Exhibit H to Amended Complaint. 457

THE AMERICAN TOBACCO COMPANY
SUBSIDIARY COMPANY

J. WIX & SONS, LTD.

Name and Position	*Compensation for Year 1930*	*Shares Allotted*
R. W. Richards, Manager, Publicity & Advertising	10,000.00	130
J. R. Dertinger, Manager, Manufacturing End	6,500.00	85
H. N. Gerken, Manager, Sales Department	12,500.00	125
F. H. Wright, Head of Accounting.	4,866.00	50
F. G. Roe, Head Field Man	5,187.00	45
Gustav A. Buchheister, Ass't to Manager Manufacturing Department	3,500.00	25
T. W. Bell, Clerk	3,200.00	25

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THE AMERICAN TOBACCO COMPANY

MISCELLANEOUS

Louis S. Levy, of Counsel	74,000.00	980
Junius Parker	30,000.00	400
Ivy Lee	50,000.00	250
Dr. D. R. Jensen	4,000.00	50
F. de P. Alvarez	Commission Basis	100

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NOTE: The compensation set forth in this exhibit does not include the credits referred to in paragraph 21 (f) of this amended complaint and set forth in Exhibit Q.

460 **Exhibit I.**

COPY OF RESOLUTION AS PASSED AT ANNUAL MEETING OF STOCKHOLDERS HELD MARCH 13, 1912.

Mr. J. T. Wilcox proposed the addition of a new Article to the By-Laws, as follows:

ARTICLE XII.

Section 1. As soon as practicable after the end of the year 1912 and of each year of the company's operations thereafter, the Treasurer of the Company shall ascertain the net profits, as hereinafter defined, earned by the Company during such year, and if such net profits exceed the sum of $8,222,245.82, which is
461 the estimated amount of such net profits earned during the year 1910 by the business that now belong to the Company, the Treasurer shall pay an amount equal in the aggregate to ten per cent. of such excess to the President and five Vice-Presidents of the Company in the following proportions, to wit: one-fourth thereof or 2½ per cent. of such amount to the President; one-fifth of the remainder thereof, or 1½ per cent. of such amount to each of the five Vice-Presidents as salary for the year, in addition to the fixed salary of each of said officers.

Section 2. If any such office be vacant for a time amounting in the aggregate to one month in any year, so much of the amount provided by this resolution to
462 be paid to the incumbent of such office as is proportionate to the time of such vacancy shall be returned into general profit of the company. If there shall be a change during the year in the incumbent of any office, the amount hereinbefore provided to be paid shall be divided among the different incumbents of such office in the proportion of their respective periods of incumbency during the year, subject to the above provision in relation to vacancies.

Section 3. For the purpose of this By-Law the net profits earned by the Company in any year shall consist of the net earnings made by the Company in its business as a manufacturer and seller of tobacco and its products after deducting all expenses and losses, such provisions as shall be determined by the Board of Directors of the Company for depreciation and for all outstanding trade obligations, and an additional amount equal to 6 per cent. dividends on $52,459,400 of its 6 per cent. preferred stock, to which profits shall be added, or from which profits shall be deducted as the case may be, the Company's proportion (based on its stock holdings) of the net profits or losses for the year of its subsidiary companies engaged in the manufacture and sale of smoking tobacco, chewing tobacco, cigarettes or little cigars, except earnings on preference shares of British American Tobacco Company, Limited, and shares of Imperial Tobacco Company (of Great Britain and Ireland), Limited. 464

Section 4. The declaration of the Treasurer as to the amount of net profits for the year and the sum due anyone hereunder shall be binding and conclusive on all parties, and no one claiming hereunder shall have a right to question the said declaration, or to any examination of the books or accounts of the Company and nothing herein contained shall give any incumbent of any office any right to claim to continue therein or any other right except as herein specifically expressed. 465

Section 5. This By-Law may be modified or repealed only by the action of the stockholders of the Company and not by the directors.

Mr. R. J. Boylan seconded such addition to the By-Laws and on being put to a vote such addition to the By-Laws

received in its favor the vote of 621,047 shares of stock and the vote of 35 shares of stock was cast against such addition, this vote being made up as follows: All of the stock represented at the meeting voted in favor of the amendment with the exception of the following which voted against it:

Claudia M. Etting.....35 shares Preferred

and the following which was not voted either for or against:

		Com.	*Pref.*
	Lincoln Trust Company, Trustee for:		
467	Julia G. Gayley.....	50	133
	Ruth Alice Halliwell.....	1,150	
	Walter S. Halliwell.....	1,150	

The Chairman thereupon declared the resolution adopted, and the addition to the By-Laws of Section XII as hereinbefore set out, duly authorized and directed.

Exhibit J.

Directors present at meeting Messrs. J. Parker, G. W. Hill, C. A. Penn, A. C. Mower, J. R. Taylor, C. F. Neiley.

468 COPY OF RESOLUTION PASSED AT BOARD OF DIRECTORS MEETING HELD MARCH 5TH, 1926.

On motion duly made and seconded, the following preamble and resolution was unanimously adopted:

WHEREAS the late President of the Company, Mr. Percival S. Hill, in co-operation with the Treasurer, had before his death arranged for the purchase by Richard J. Boylan of 7,000 shares of the common stock or common stock B

of the Company, the said purchase to be financed by the Company, with the purpose, as expressed by him to some of the other officers of the Company, that such should be available at net cost thereof, including brokers' commissions and with interest, to officers or other valued employees of the Company, with provision for financing by the Company for a period not to exceed five years:

RESOLVED:

That it is the sense of this Board that it is an exceedingly wise policy, and to the very best interests of this Company, that officers and important employees of this Company be encouraged and induced in all proper ways consistent with practical safety to the Company to hold and increase their holdings in the stock of the Company; 470

That a committee is hereby appointed consisting of the Chairman of the Board, Mr. Geddes and Mr. Perkins, with power and authority as follows:

To arrange for the purchase on the market from time to time in their discretion of not to exceed 23,000 shares of the common stock and/or common stock B of this Company, such purchase to be financed by the Company, and such purchases to be either direct by the Company or through some individual or bank or trust company, as the committee may determine;

To arrange to permit the acquisition of the stock so purchased, and the 7,000 shares referred to in the preamble of this resolution, by officers and valued employees of the Company as may be recommended by the President of the Company and approved by the committee (the said officers and valued employees may include the President himself), at a price not less than the net cost thereof on the market including brokers' commissions, charging into the price interest from the time purchased until the time of allocation to the officer or valued employee, and credit- 471

ing on the price dividends declared and paid between the time of acquisition and the time of allocation;

That the said committee be further authorized to arrange for the financing for the said officers and valued employees aforesaid of the purchase price so to be paid by said officers and valued employees for said stock, by guaranty by this Company or loans by this Company, not to exceed in point of time five years from the date of such allocation with provision for reduction of the loans of the Company to them, or the loans to them guaranteed by the Company, to the extent of at least one-fifth thereof each year; such loans to be covered by the direct personal obligation of the officer or valued employee to whom such
473 stock may be allocated, with certificates for the shares of stock as collateral but with provision for proportionate withdrawal of collateral as the debt is reduced;

That the members of said committee and none of them shall be deemed an officer or valued employee to whom or for whose personal benefit any of the privileges herein contemplated shall be allocated;

That the details of the purchase and allocation and provision for protection of the Company within the limits hereinbefore set forth shall be in the discretion of the committee, and the committee is hereby given authority to act.

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Exhibit K.

For a good and valuable consideration and for the further consideration as expressed in a certain certified copy of a resolution duly adopted on the 5th day of March, 1926, by the Board of Directors of The American Tobacco Company, and duly certified by Secretary on the 30th day of July, 1926, the undersigned hereby guarantees the prompt payment of the principal and interest of the note

annexed hereto, made by Frank W. Harwood for the sum of $28,932.27.

Dated, New York, August 2, 1926.

THE AMERICAN TOBACCO COMPANY
By:.....
Vice-President

Attest:

.....
Secretary.

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Exhibit L.

COPY OF RESOLUTION PASSED AT BOARD OF DIRECTORS' MEETING HELD ON 16TH DAY OF OCTOBER, 1929.

On motion duly made and seconded, it was unanimously (Mr. George W. Hill not voting)

RESOLVED:

That the President of the Company be, and he hereby is, authorized to purchase common stock A and/or common stock B in an amount not to exceed sixty thousand (60,000) shares at a price not to exceed $175.00 per share 477
(the present market quotation of same being approximately $222.00 per share), alloting same to valued employees in accordance with precedents of many years standing established by the late President, Percival S. Hill, and since followed by the Company, as witnessed in resolution of March 5, 1926; and

FURTHER RESOLVED:

That upon acquisition of said stock the President of the Company be, and he hereby is, authorized to allot the same at cost thereof (consisting of purchase price, plus interest at the rate of six per cent (6%) per annum from date of purchase to date of allotment less dividends received on said stock to date of allotment) approximating but not exceeding $175 per share (the present market value of such stock being approximately $222) to such officers and/or employees and upon such terms as may in his opinion be deemed to the best interest of the Company in promoting and encouraging greater efficiency, more har-
479 monious and enthusiastic cooperation and greater endeavors toward the welfare of the Company; and

That such allotment of stock shall come under the terms provided in resolution of February 4, 1914, as amended by resolution of July 12, 1929, and further amended by resolution of August 28, 1929, and the resolution of July 31, 1929.

Directors Present at Meeting:

Messrs. George W. Hill
C. F. Neiley
C. A. Penn
Vincent Riggio
Thos. R. Taylor
480 F. W. Harwood
C. S. Keene
J. K. Fletcher
J. B. Harvie
R. J. Boylan

Exhibit M.

481

COPY OF RESOLUTION PASSED AT BOARD OF DIRECTORS' MEETING HELD ON 4TH DAY OF FEBRUARY, 1914.

"RESOLVED:

"That the Treasurer of this Company be, and he is hereby authorized and directed to create a fund out of the profits of the business, to be charged a part of the expenses of conducting the business just as the general administration expenses are now charged, amounting to Twenty Thousand ($20,000) Dollars per month, beginning January, 1914.

"This fund, or any part hereof, shall be available for use in increasing the compensation and their interest in 482
the Company of valued employees, to be selected from time to time by the President, with the advice and consent of this Board, in the following way, to-wit: That any part of the fund not theretofore used may be used by the President in making loans to valued employees for the purchase of the preferred or common stock of the Company in such way and upon such terms as the President may determine; or in paying part of the purchase price of the preferred or common stock of the Company, *provided,* that no payment out of the fund on the purchase price shall be such as to reduce the purchase price to be paid by the valued employee to less than 90 per cent. of the par value of the preferred stock, or 150 per cent. of the par value of the common stock.

"That the President report any transactions hereunder 483
to the Board for its ratification and approval.

"That the Treasurer administer the fund, keeping and collecting notes that may be given on account of advances made from the fund separate from the general bills and accounts receivable of the Company, so that when collections are made on either principal or interest they may be credited to the said fund; but without the necessity of

484 *Exhibit M to Amended Complaint.*

segregating the monies at any time in said fund from the general monies of the Company."

Directors Present at Meeting:

Messrs: P. S. Hill
W. H. O'Brien
M. W. Reed
C. S. Keene
J. T. Wilcox

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485 **Exhibit N.**

COPY OF RESOLUTION PASSED AT BOARD OF DIRECTORS' MEETING HELD ON 12TH DAY OF JULY, 1929.

The President brought to the attention of the Board a certain resolution passed at the meeting held February 4, 1914, which resolution authorized the creation, out of the profits of the business, of a fund of $20,000.00 per month for purposes as stated therein, and which resolution had been modified, in the meantime, by resolutions of June 27, 1928 and January 30, 1929, so that by reason of these modifications, at the present time, a fund of only $5,000.00 per month was being thus created.

He stated that the Treasurer of the Company had sug-
486 gested the advisability of creating this fund at the rate originally intended, to wit: $240,000.00 per year; and that in order that there might be available at the end of the year 1929, the sum of $240,000.00, as was originally intended, he further suggested that the fund be created throughout the remainder of the year at such a rate as would produce this amount, and that thereafter, until further action by the Board, the fund should be created at the rate of $20,000.00 per month, and that he, the President, after consultation with the Treasurer and other ex-

ecutives, recommended the adoption of the Treasurer's suggestion; whereupon,

On motion duly made and seconded, it was unanimously

RESOLVED:

"That the recommendation of the President be adopted and the Treasurer be, and he hereby is, authorized to proceed accordingly."

Directors Present at Meeting:

Messrs. G. W. Hill
C. A. Penn
C. F. Neiley 488
J. E. Lipscomb, Jr.
T. R. Taylor
C. S. Keene
R. J. Boylan

Exhibit O.

COPY OF RESOLUTION PASSED AT BOARD OF DIRECTORS' MEETING HELD 28TH DAY OF AUGUST, 1929.

"RESOLVED:

That the resolution of February 4, 1914, providing for the creation of a fund of $20,000.00 a month (as amended and recently reaffirmed) be deemed amended as of January 1, 1929, so that the fund of $20,000.00 a month therein provided for may be available and is hereby made available to be used in whole or in part (so far as not otherwise appropriated) to cover the payment of extra compensation in stock—even though the valued employee so paid contributed no part of the purchase price." 489

490 *Exhibit O to Amended Complaint.*

Directors Present at Meeting:

Messrs. G. W. Hill
C. F. Neiley
T. R. Taylor
J. B. Harvie
F. W. Harwood
C. S. Keene
V. Riggio
A. C. Mower
R. J. Boylan

491

Exhibit P.

THE AMERICAN TOBACCO COMPANY
111 Fifth Avenue
New York

The undersigned, a duly authorized officer of The American Tobacco Company, does hereby certify that, at a meeting of the Board of Directors of said Company held at its office in the City of New York, N. Y., on the 31st day of July, 1929, a quorum being present, the following preamble and resolution was unanimously adopted:

"The President stated to the Board that upon the recent election of two Vice-Presidents he had made an arrange-
492 ment (after being duly authorized by this Board) whereby a lesser sum was accepted by such Vice-Presidents than they would have been entitled to receive pursuant to the strict terms of Article XII of the By-Laws of this Company and that in the cases above mentioned a part of the extra compensation for a Vice-President provided by said By-Law has been waived. He also stated that as to the election of a fifth Vice-President to be elected on this date, he had made a similar arrangement. He further stated

that there had thus been effected a considerable saving, or prospective saving, without there being any reason to anticipate that such saving would result in any diminution of efficiency; he said that he felt that it was appropriate and very fitting that a sum approximating the saving thus effected should be added to the fund being created under resolution of February 4, 1914 as amended to date and that the fund as thus increased could, he thought, be properly and fittingly utilized by him with the approval of the Board in such a way as to actually and very substantially increase efficiency, effectiveness and harmonious working of the organization, and give merited recognition to exceptionally loyal and capable employees.

The President further stated that the Treasurer had 494
made a suggestion, which he explained, and which was incorporated and approved in the following resolution:

On motion duly made and seconded, it was unanimously

RESOLVED:

That the resolution of the Board passed on the first day of May, 1929, be amended to read as follows:

RESOLVED:

That the Vice-Presidents of the Company newly elected on and after this date, May 1, 1929, shall receive such fixed salary as shall be arranged and determined by the President after consultation with the Board, and that in
lieu and diminution of the contingent compensation pro- 495
vided in the By-Laws of the Company, Article XII, for the active Vice-Presidents, such newly elected Vice-Presidents elected on and after this date, May 1, 1929, shall receive contingent compensation, if any, as may be arranged with them by the President and determined by him, with the approval of the Board, and that any difference arising under these arrangements shall be added at the discretion of the President to the fund provided under

496 *Exhibit P to Amended Complaint.*

the resolution of February 4, 1914, as amended to date.

That this resolution shall not be construed to mean that all Vice-Presidents elected on and after this date, May 1, 1929, shall receive contingent compensation on the same basis, it being the intent of this resolution that the basis of computing contingent compensation payable to such Vice-Presidents shall be left to the discretion of the President of the Company, but not to exceed such a sum as would have been payable on the basis as provided for in the By-Laws.

That such Vice-Presidents (with whom such arrangements are made) shall receive contingent compensation
497 on said basis upon any reelection or reelections unless and until otherwise ordered by this Board.

That this resolution shall not apply to any Vice-President or Vice-Presidents holding office prior to May 1, 1929.

This resolution supersedes and amends the resolution of May 1, 1929 herein referred to and becomes effective as of that date (May 1, 1929) and arrangements made by the President with Vice-Presidents in the meantime are hereby ratified."

WITNESS my hand and seal of said The American Tobacco Company, at New York, N. Y., this 2nd day of August, 1929.

RICHARD J. BOYLAN,
498 Secretary.

Exhibit Q.

THE AMERICAN TOBACCO COMPANY

Stock Allotted for Sale October 16, 1929

Name	Shares ($50 par)	Contract Price	Credit 1929	Credit 1930
Douglas Brashear	250 B	$ 43,062.50	$ 2,267.58	$ 4,542.70
Richard J. Boylan	1,000 A	172,250.00	9,070.29	18,170.81
William H. Boyd	100 B	17,225.00	907.03	1,817.08
William F. Burch	100 B	17,225.00	907.03	1,817.08
John A. Crowe	250 B	43,062.50	2,267.58	4,542.70
J. Raymond Cummings	100 B	17,225.00	907.03	1,817.08
Frank S. Caldwell	100 B	17,225.00	907.03	1,817.08
Henry P. Cunningham	100 B	17,225.00	907.03	1,817.08
Joseph P. Connell	100 B	17,225.00	907.03	1,817.08
James R. Coon	100 B	17,225.00	907.03	1,817.08
Almond L. Chesley	100 B	17,225.00	907.03	1,817.08
John S. Dowd	100 B	17,225.00	907.03	1,817.08
Richard H. Fletcher	100 B	17,225.00	907.03	1,817.08
John K. Fletcher	250 B	43,062.50	2,267.58	4,542.70
C. Huntley Gibson	150 B	25,837.50	1,360.55	2,725.60
Raymond F. Griffith	100 B	17,225.00	907.03	1,817.08
James B. Harvie	1,000 A	172,250.00	9,070.29	18,170.81
Frank W. Harwood	1,000 A	172,250.00	9,070.29	Resigned
Tullis T. Harkrader	250 B	43,062.50	2,267.58	4,542.70
Edmond A. Harvey	100 B	17,225.00	907.03	1,817.08
Thomas W. Harris	250 B	43,062.50	2,267.58	Resigned
John G. Hager	150 B	25,837.50	1,360.85	2,725.62
George W. Hundley	100 B	17,225.00	907.03	1,817.08
George W. Hill	5,050 A 10,000 B	2,592,362.50	136,507.71	273,470.76
D. Rees Jensen	100 B	17,225.00	907.03	1,817.08
Russell H. Kuhn	250 B	43,062.50	2,267.58	4,542.70
James E. Lipscomb, Jr.	1,500 B	258,375.00	13,605.43	27,256.22
John P. Le Seuer	100 B	17,225.00	907.03	1,817.08
Raymond H. Moorman	100 B	17,225.00	907.03	1,817.08
Arthur C. Mower	5,000 B	861,250.00	45,351.40	90,854.06
Charles F. Neiley	4,950 B	852,637.50	44,897.89	89,945.52
William H. Ogsbury	250 B	43,062.50	2,267.58	4,542.70
John J. O'Keeffe	100 B	17,225.00	907.03	1,817.08
Oscar W. Peaslee	250 B	43,062.50	2,267.58	4,542.70
Pierre Persinachi	250 B	43,062.50	2,267.58	4,542.70
Charles A. Penn	5,000 A 5,000 B	1,722,500.00	90,702.80	181,708.12
Howland W. Richards	100 B	17,225.00	907.03	1,817.08
Fred B. Reuter	100 B	17,225.00	907.03	1,817.08
Frank V. Riggio	100 B	17,225.00	907.03	1,817.08
Vincent Riggio	5,000 B	861,250.00	45,351.40	90,854.06
William D. Stocks	250 B	43,062.50	2,267.58	4,542.70
Alfred L. Serna	100 B	17,225.00	907.03	1,817.08
James F. Strickland	100 B	17,225.00	907.03	1,817.08
James P. Spearman	100 B	17,225.00	907.03	1,817.08
Franklin H. Stafford	100 B	17,225.00	907.03	1,817.08
Harry H. Strauss	100 B	17,225.00	907.03	1,817.08
Allan P. Turner	250 B	43,062.50	2,267.58	4,542.70
Thomas R. Taylor	1,000 A	172,250.00	9,070.29	18,170.81
William E. Witzleben	100 B	17,225.00	907.03	1,817.08
Alfred F. Bowden	50 A	8,612.50	453.52	908.54
Margaret A. Devlin	50 B	8,612.50	453.52	908.54
Armour S. Houston	500 B	86,125.00	4,535.14	9,085.41

496 *Exhibit P to Amended Complaint.*

the resolution of February 4, 1914, as amended to date.

That this resolution shall not be construed to mean that all Vice-Presidents elected on and after this date, May 1, 1929, shall receive contingent compensation on the same basis, it being the intent of this resolution that the basis of computing contingent compensation payable to such Vice-Presidents shall be left to the discretion of the President of the Company, but not to exceed such a sum as would have been payable on the basis as provided for in the By-Laws.

That such Vice-Presidents (with whom such arrangements are made) shall receive contingent compensation
497 on said basis upon any reelection or reelections unless and until otherwise ordered by this Board.

That this resolution shall not apply to any Vice-President or Vice-Presidents holding office prior to May 1, 1929.

This resolution supersedes and amends the resolution of May 1, 1929 herein referred to and becomes effective as of that date (May 1, 1929) and arrangements made by the President with Vice-Presidents in the meantime are hereby ratified."

WITNESS my hand and seal of said The American Tobacco Company, at New York, N. Y., this 2nd day of August, 1929.

RICHARD J. BOYLAN,
Secretary.

498

Exhibit Q.

THE AMERICAN TOBACCO COMPANY

Stock Allotted for Sale October 16, 1929

Name	Shares ($50 par)	Contract Price	Credit 1929	Credit 1930
Douglas Brashear	250 B	$ 43,062.50	$ 2,267.58	$ 4,542.70
Richard J. Boylan	1,000 A	172,250.00	9,070.29	18,170.81
William H. Boyd	100 B	17,225.00	907.03	1,817.08
William F. Burch	100 B	17,225.00	907.03	1,817.08
John A. Crowe	250 B	43,062.50	2,267.58	4,542.70
. Raymond Cummings	100 B	17,225.00	907.03	1,817.08
Frank S. Caldwell	100 B	17,225.00	907.03	1,817.08
Henry P. Cunningham	100 B	17,225.00	907.03	1,817.08
Joseph P. Connell	100 B	17,225.00	907.03	1,817.08
James R. Coon	100 B	17,225.00	907.03	1,817.08
Almond L. Chesley	100 B	17,225.00	907.03	1,817.08
John S. Dowd	100 B	17,225.00	907.03	1,817.08
Richard H. Fletcher	100 B	17,225.00	907.03	1,817.08
John K. Fletcher	250 B	43,062.50	2,267.58	4,542.70
. Huntley Gibson	150 B	25,837.50	1,360.55	2,725.60
Raymond F. Griffith	100 B	17,225.00	907.03	1,817.08
James B. Harvie	1,000 A	172,250.00	9,070.29	18,170.81
Frank W. Harwood	1,000 A	172,250.00	9,070.29	Resigned
Tullis T. Harkrader	250 B	43,062.50	2,267.58	4,542.70
Edmond A. Harvey	100 B	17,225.00	907.03	1,817.08
Thomas W. Harris	250 B	43,062.50	2,267.58	Resigned
John G. Hager	150 B	25,837.50	1,360.85	2,725.62
George W. Hundley	100 B	17,225.00	907.03	1,817.08
George W. Hill	5,050 A 10,000 B	2,592,362.50	136,507.71	273,470.76
. Rees Jensen	100 B	17,225.00	907.03	1,817.08
Russell H. Kuhn	250 B	43,062.50	2,267.58	4,542.70
James E. Lipscomb, Jr.	1,500 B	258,375.00	13,605.43	27,256.22
John P. Le Seuer	100 B	17,225.00	907.03	1,817.08
Raymond H. Moorman	100 B	17,225.00	907.03	1,817.08
Arthur C. Mower	5,000 B	861,250.00	45,351.40	90,854.06
Charles F. Neiley	4,950 B	852,637.50	44,897.89	89,945.52
William H. Ogsbury	250 B	43,062.50	2,267.58	4,542.70
John J. O'Keeffe	100 B	17,225.00	907.03	1,817.08
Oscar W. Peaslee	250 B	43,062.50	2,267.58	4,542.70
Pierre Persinachi	250 B	43,062.50	2,267.58	4,542.70
Charles A. Penn	5,000 A 5,000 B	1,722,500.00	90,702.80	181,708.12
Howland W. Richards	100 B	17,225.00	907.03	1,817.08
Fred B. Reuter	100 B	17,225.00	907.03	1,817.08
Frank V. Riggio	100 B	17,225.00	907.03	1,817.08
Vincent Riggio	5,000 B	861,250.00	45,351.40	90,854.06
William D. Stocks	250 B	43,062.50	2,267.58	4,542.70
Alfred L. Serna	100 B	17,225.00	907.03	1,817.08
James F. Strickland	100 B	17,225.00	907.03	1,817.08
James P. Spearman	100 B	17,225.00	907.03	1,817.08
Franklin H. Stafford	100 B	17,225.00	907.03	1,817.08
Harry H. Strauss	100 B	17,225.00	907.03	1,817.08
Allan P. Turner	250 B	43,062.50	2,267.58	4,542.70
Thomas R. Taylor	1,000 A	172,250.00	9,070.29	18,170.81
William E. Witzleben	100 B	17,225.00	907.03	1,817.08
Alfred F. Bowden	50 A	8,612.50	453.52	908.54
Margaret A. Devlin	50 B	8,612.50	453.52	908.54
Armour S. Houston	500 B	86,125.00	4,535.14	9,085.41
Totals	51,750	$8,913,937.50	$469,387.23	$917,625.96

502 **Exhibit R.**

Office of the Secretary

THE AMERICAN TOBACCO COMPANY
111 Fifth Avenue
New York

The undersigned, a duly authorized officer of The American Tobacco Company, does hereby certify that, at a meeting of the Board of Directors of said Company held at its office in the City of New York, N. Y., on the first day of May, nineteen hundred and twenty-nine, a quorum being present, the following resolution was unanimously adopted:

503 "RESOLVED:

That the Vice-Presidents of the Company elected on and after this date shall receive the fixed salary for active Vice-Presidents, at the rate in effect at the time of their election, and that in lieu and diminution of the contingent compensation provided in the By-Laws of the Company, Article XII, for the active Vice-Presidents, such Vice-Presidents elected on and after this date shall receive contingent compensation based on the earnings of the Company, but after substituting for the estimated net profits earned during the year 1910 as set forth in the said By-Laws of the Company, Article XII, the earnings of the Company for such year as may be determined upon by the President of the Company, with all other provisions
504 unchanged, and with the difference created through this substitution reverting into the Treasury of the Company.

That this resolution shall not be construed to mean that all Vice-Presidents elected on and after this date shall receive contingent compensation on the same basis, it being the intent of this resolution that the basis of computing contingent compensation, payable to such Vice-Presidents, shall be left to the discretion of the President of the Company, but not to exceed such a sum as would

have been payable on the basis as provided for in the By-Laws.

That such Vice-Presidents shall receive contingent compensation on this basis upon any re-election or re-elections unless and until it is otherwise ordered by this Board.

That this resolution shall not apply to any Vice-President or Vice-Presidents now holding such office."

WITNESS my hand and the seal of said The American Tobacco Company, at New York, N. Y., this first day of May, nineteen hundred and twenty-nine.

RICHARD J. BOYLAN, 506
Secretary.

Exhibit S.

THE AMERICAN TOBACCO COMPANY
111 Fifth Avenue
New York

The undersigned, a duly authorized officer of The American Tobacco Company, does hereby certify that, at a meeting of the Board of Directors of said Company held at its office in the City of New York, N. Y., on the 31st day of July, 1929, a quorum being present, the following preamble and resolution was unanimously adopted: 507

"The President stated to the Board that upon the recent election of two Vice-Presidents he had made an arrangement (after being duly authorized by this Board) whereby a lesser sum was accepted by such Vice-Presidents than they would have been entitled to receive pursuant to the strict terms of Article XII of the By-Laws of this Company and that in the cases above mentioned a part of the extra compensation for a Vice-President provided by said

By-Law has been waived. He also stated that as to the election of a fifth Vice-President to be elected on this date, he had made a similar arrangement. He further stated that there had thus been effected a considerable saving, or prospective saving, without there being any reason to anticipate that such saving would result in any diminution of efficiency; he said that he felt that it was appropriate and very fitting that a sum approximating the saving thus effected should be added to the fund being created under resolution of February 4, 1914, as amended to date and that the fund as thus increased could, he thought, be properly and fittingly utilized by him with the approval
509 of the Board in such a way as to actually and very substantially increase efficiency, effectiveness and harmonious working of the organization, and give merited recognition to exceptionally loyal and capable employees.

The President further stated that the Treasurer had made a suggestion, which he explained, and which was incorporated and approved in the following resolution:

On motion duly made and seconded, it was unanimously

RESOLVED:

That the resolution of the Board passed on the first day of May, 1929, be amended to read as follows:

RESOLVED:

510 That the Vice-Presidents of the Company newly elected on and after this date, May 1, 1929, shall receive such fixed salary as shall be arranged and determined by the President after consultation with the Board, and that in lieu and diminution of the contingent compensation provided in the By-Laws of the Company, Article XII, for the active Vice-Presidents, such newly elected Vice-Presidents elected on and after this date, May 1, 1929, shall receive contingent compensation, if any, as may be arranged with them by the President and determined by

him, with the approval of the Board, and that any difference arising under these arrangements shall be added at the discretion of the President to the fund provided under the resolution of February 4, 1914, as amended to date.

That this resolution shall not be construed to mean that all Vice-Presidents elected on and after this date, May 1, 1929, shall receive contingent compensation on the same basis, it being the intent of this resolution that the basis of computing contingent compensation payable to such Vice-Presidents shall be left to the discretion of the President of the Company, but not to exceed such a sum as would have been payable on the basis as provided for in the By-Laws.

That such Vice-Presidents (with whom such arrangements are made) shall receive contingent compensation on said basis upon any reelection or reelections unless and until otherwise ordered by this Board. 512

That this resolution shall not apply to any Vice-President or Vice-Presidents holding office prior to May 1, 1929.

This resolution supersedes and amends the resolution of May 1, 1929, herein referred to and becomes effective as of that date (May 1, 1929) and arrangements made by the President with Vice-Presidents in the meantime are hereby ratified."

WITNESS my hand and seal of said The American Tobacco Company, at New York, N. Y., this 2nd day of August, 1929. 513

RICHARD J. BOYLAN,
Secretary.

514

Exhibit T.

THE AMERICAN TOBACCO COMPANY
111 Fifth Avenue
New York

New York, N. Y., April 15, 1926.

To Employees of The American Tobacco Company

The Company again offers to its employees the privilege of acquiring shares of its six per cent preferred stock at the price of One Hundred and Five Dollars ($105.00) per share, subject to the following conditions:

1. All applications to purchase must be made on blanks
515 that will be furnished, and must be received at the New York Office on or before July 1, 1926.

2. All applications to purchase, and purchases, are to be made with the understanding that the decision of the Committee of The American Tobacco Company appointed by its Board of Directors to Administer this Plan, shall be at all times final with respect to any question relating to the rights or interests of the parties.

3. All applications shall be to acquire one or more shares of preferred stock at the purchase price of One Hundred and Five Dollars ($105.00) per share, with the understanding that there may be allotted to the applicant
516 all or any part of the shares applied for by such applicant, as the Committee may determine.

4. The maximum shares which may be purchased by employees are as follows: By employees receiving salaries or wages at the rate of $999 or a less amount per year, two shares; $1000 to $1999, four shares; $2000 to $2999, six shares; $3000 to $3999, eight shares; $4000 to $9999, ten shares; $10,000 and over, twenty shares. An employee of any class may apply for a lesser number of shares than the maximum.

5. Payment of the purchase price shall be in monthly instalments to be deducted from salary or wages of the purchaser, in such amounts as the purchaser may designate, subject to the provisions—(A) That the amount of each monthly instalment on the purchase price shall be at the rate of at least $4 per share, and (B) That each instalment on the purchase price for the whole number of shares acquired shall not exceed 25 per cent of the average one month's salary or wage. The stock must be paid for within two years. Interest for three months at the rate of 5 per cent per annum will be charged on October 1, January 1, April 1 and July 1, on balance owing as of three months prior to said dates respectively.

518

6. Commencing October 1, 1926, and during the continuation of payments, as hereinbefore provided, amounts equal to 1½% quarterly dividends paid on stock, will be credited to the account of the applicant in reduction of balance due, until the stock is paid for and issued to purchaser, after which dividends will be paid as to other stockholders.

7. After application to purchase, and even after partial payments, arrangements will be terminated:

(a) At the request of the applicant.

(b) Whenever payments on account of purchase shall have become in arrears for a period of three months. 519

Thereupon, that is, upon the happening of (a) or (b), all interest in the stock will stand cancelled and there will be returned to the applicant the exact amount of all payments made on account, without interest, no payment being made to such applicant for dividends or the special allowance referred to herein.

(c) By applicant leaving the service of the Company, voluntarily or involuntarily.

520 *Exhibit T to Amended Complaint.*

Upon the happening of (c), all interest in the stock of the applicant will stand cancelled and there will be returned to applicant the exact amount of payments made on account, without interest, no payment being made to applicant for dividends or the special allowance referred to herein; or applicant may within thirty days, complete payment in a lump sum and receive certificate of stock.

8. When the stock is fully paid for, it will be transferred into the name of the purchaser and certificate delivered, and purchaser may then sell such stock; the Company, however, will not buy it back. As an inducement
521 for purchaser to keep the stock while remaining in the service of the Company, the following offer is made, viz:

If the purchaser will, in January of each year for five years commencing with January, 1927, exhibit the identical certificate of stock (after having received the certificate) to a proper official of the Company, and make statement that purchaser has transferred no interest therein, and furnish a written statement from such official, that purchaser has been continuously in the employ of the Company during the preceding year, and has shown a proper interest in its welfare, (the statement to give the serial number of the stock certificate submitted to such official and the number of shares) purchaser will, for such year, receive a cash payment of $4 a share for each share of stock, or a credit on the purchase price, in case the
522 stock is not fully paid for, at the rate of $4 a share for each share of stock.

9. The employee may in his application or by written notice to the Treasurer of the Company at any time, and from time to time, prior to the issuance of a certificate of stock to him, designate a beneficiary, to whom in the event of his death he desires the Company to issue the certificate and to pay all amounts to which his estate would otherwise be entitled under his subscription, and the Company

will issue the certificate and make payment of all such amounts, in accordance with the designation so made, subject to any limitations imposed by law and to the provisions of paragraph No. 10.

10. In the event of the death of the employee during the five year period, the benefits provided in paragraph 8 shall cease as of the January preceding such death. Upon the death of an employee, his beneficiary, or personal representative, if he has not appointed a beneficiary, shall either furnish the Company with proof of the payment of all inheritance taxes, or the necessary waivers of notice of transfer from tax officials (and in the case of a personal representative his authorization papers) and thereupon: 524
(a) if death occurred after the purchase price was fully paid, but before the transfer of the certificate into the name of the employee, such beneficiary or personal representative may have the transfer of the certificate made as he may direct; but (b) if death occurs before the purchase price has been fully paid, such beneficiary or personal representative shall have the option of paying the balance of the purchase price in a lump sum within sixty days (60) and receiving the stock, or receiving a sum of money equal to the difference between the purchase price and the unpaid balance due thereon.

THE AMERICAN TOBACCO COMPANY
INCORPORATED. 525

IMPORTANT INFORMATION FOR THE EMPLOYEE

On the basis of monthly deductions of $4 per share, this plan enables the subscriber to spread his payments over 23 months and obtain Preferred Stock at an outlay of $92.19 a share.

526 *Exhibit T to Amended Complaint.*

The Company offers the stock at.....		$105.00
To this is added 5% interest on unpaid balances		5.69
Making a total gross cost of.....		$110.69
But the subscriber is credited with 7 quarterly dividends of $1.50 each and 2 extra credits of $4 each while he is paying for his stock, thus deducting.....		18.50
Leaving the net amount to be paid by the subscriber.....		$92.19
This is covered by 22 monthly deductions of $4 each from the payroll		
527 July, 1926, to April, 1928, making a total of.....	$88.00	
And a final payment in May, 1928, of..	4.19	92.19

The price of the stock on this allotment is $105 per share and though it will probably cost the Company over $109 to acquire it in the open market, the amount actually deducted from the employee's salary in payment for same is but $92.19 per share as shown by the foregoing illustration.

Exhibit U.

528 THE AMERICAN TOBACCO COMPANY

ANNUAL REPORT

Fiscal Year Ended December 31, 1930

Jersey City, N. J., March 12, 1931.

THE TREASURER'S REPORT TO THE STOCKHOLDERS OF THE AMERICAN TOBACCO COMPANY OF NEW JERSEY

The Treasurer respectfully submits the following financial report of your Company, for the year ended December 31, 1930.

Exhibit U to Amended Complaint. 529

As required by the Trust Indenture of October 20, 1904, the Guaranty Trust Company, Trustee, purchased and cancelled 6% Gold Bonds of this Company of the par value of $23,000.00, the cost of same being $26,887.50. The difference between par value and cost of the bonds so purchased has been written off as an expense.

The Merger Agreement under which the Company is constituted has been amended so as to:

(1) Change the authorized Common Stock from One Million Shares of the par value of $50 each to Two Million Shares of the par value of $25 each, and the authorized Common Stock B from Two Million Shares of the par value of $50 each to Four Million Shares of the par value of $25 each. 530

(2) Change the rights of the holders of shares of Preferred Stock of the par value of $100 each so as to give them four votes for each share instead of two votes.

Common Stock B of the par value of $950.00 has been issued during the year in retirement of dividend certificates which had matured.

The statement of earnings includes only the dividends received from those companies a part only of whose stock is owned by this Company; but it includes the total net profits for the year of companies all of whose stock is owned by, or held in trust for, this Company. 531

The net earnings, *after deducting depreciation and all charges and expenses for management, taxes,** including provision for federal income tax, etc., were	$ 43,345,370.86
Deduct:—	
Premium on 6% Gold Bonds purchased and cancelled.....	3,887.50
	$ 43,341,483.36

* See footnote on next page.

Deduct:—		
Interest on 6% Gold Bonds.....	$ 11,624.34	
Interest on 4% Gold Bonds.....	35,090.00	
4 Quarterly Dividends of $1.50 each on 6% Cumulative Preferred Stock ($100 par value)	3,161,982.00	3,208,696.34
Net, applicable to Surplus Account.....		$ 40,132,787.02
Surplus as per statement Dec. 31, 1929..		80,869,332.24
		$121,002,119.26
Deduct:—		
533 Cash Dividends on Common Stock and Common Stock B as follows:		
March 1, $2.00 a share ($50 par value).....	$ 4,687,026.00	
June 2, $2.00 a share ($50 par value).....	4,687,032.00	
Sept. 2, $2.00 a share and $4.00 a share extra ($50 par value)..	14,061,108.00	
Dec. 1, $1.25 a share ($25 par value).....	5,858,817.50	29,293,983.50
		$ 91,708,135.76
Adjustment of Paid in Surplus.....		157,536.88
Surplus Dec. 31, 1930.....		$ 91,865,672.64

534 The Balance Sheet is herewith submitted.

JAMES B. HARVIE, Treasurer.

* Before The American Tobacco Company received its net earnings, over $150,000,000 had been paid to the U. S. Government for taxes and duties applicable to business done in 1930, and this amount of governmental tax is included in these deductions.

Exhibit U to Amended Complaint. 535

THE AMERICAN TOBACCO COMPANY

FINANCIAL STATEMENT

December 31, 1930

ASSETS:

Real Estate, Machinery, Fixtures, etc., at cost, less reserves for depreciation and obsolescence	$ 18,100,191.82	
Leaf Tobacco, Manufactured Stock, Operating Supplies, etc., at cost	108,237,557.73	
Stocks and Bonds	43,872,065.33	
Cash	15,360,662.54	
Collateral Call Loans	8,740,888.35	
Bills Receivable	3,090,561.46	
Accounts Receivable	14,758,040.53	
Prepaid Insurance, etc	322,249.41	
Amounts owing to this Company by Affiliated Companies	10,674,708.06	536
Brands, Trade Marks, Patents, Good Will, etc	54,099,430.40	
Total Assets		$277,256,355.63

LIABILITIES:

Capital Stock, issued and outstanding:			
Preferred (Authorized $54,010,600.00)		$ 52,699,700.00	
Common (" 50,000,000.00)		40,242,400.00	
Common B (" 100,000,000.00)		76,933,950.00	
6% Gold Bonds maturing October 1, 1944		187,100.00	
4% Gold Bonds maturing August 1, 1951 and remaining 4% Gold Bonds of Consolidated Tobacco Company not yet exchanged		877,250.00	
Scrip matured March 1, 1921 and not yet presented for redemption		4,791.00	
Dividend Certificates convertible into Common Stock B March 1, 1923 and not yet presented for conversion		4,883.00	
Provision for Dividend on Preferred Stock, for quarter ended Dec. 31, 1930, payable Jan. 2, 1931	$790,495.50		537
Accrued Interest:			
Payable April 1, 1931 on 6% Bonds	2,806.50		
Payable Feb. 1, 1931 on 4% Bonds	14,620.83	807,922.83	
Accounts payable		3,890,819.28	
Amounts owing by this Company to Affiliated Companies		444,015.49	
Provision for Advertising, Contingencies, Taxes, etc		9,297,851.39	
Total Liabilities			$185,390,682.99
Surplus			$ 91,865,672.64

The above assets and liabilities include those of American Suppliers, Incorporated, a wholly owned leaf buying subsidiary.

538 **Answer of Defendants George W. Hill et al. to Amended Complaint.**

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

[TITLES OF BOTH ACTIONS.]

Defendants George W. Hill, Vincent Riggio, J. B. Harvie, R. J. Boylan, T. R. Taylor, and The American Tobacco Company, for their answer to the amended complaint, show:

I. They admit the allegations of paragraph 1 of the
539 amended complaint.

II. They admit that defendant Guaranty Trust Company is a corporation organized under the laws of New York; that defendant Junius Parker is a citizen of New York and was from December 16, 1925 to May 1, 1929 a Director and Chairman of the Board of Directors of The American Tobacco Company (hereinafter called Company); that defendant George W. Hill was and is a citizen of the State of New York and a Director of the Company from April 6, 1921 to date, Vice-President from April 6, 1921 to December 16, 1925, and President from December 16, 1925 to date; that Charles A. Penn was a citizen of North Carolina until his death on October 22, 1931, and that he was a Director and Vice-President from April 6,
540 1921 to the date of his death; that A. C. Mower was a Director from April 6, 1921 to July 31, 1931, and Vice-President from April 4, 1923 to July 31, 1931, and that on July 31, 1931 he resigned both offices; that Charles S. Keene was a Director from April 6, 1921 to August 16, 1931, and that Keene died on August 16, 1931; that J. K. Fletcher was a Director from January 16, 1929 to June 13, 1931, when he resigned; that Charles F. Neiley was a Director from April 6, 1921, and Vice-President from May 1, 1929, to date; that Vincent Riggio was a Director from

April 4, 1928, and Vice-President from May 1, 1929, to date; that J. B. Harvie was a Director from August 14, 1929, and Treasurer from April 4, 1928, to date; that R. J. Boylan was a Director from August 14, 1929, and Secretary from April 4, 1928, to date. They deny that the late defendant Penn and the defendants Mower, Keene, and Fletcher are now either Directors or employes of the Company; that the Directors of the Company were in a position to benefit by or participate in the distribution of 312,968 shares of the Common Stock B of the Company, as set forth in the amended complaint, at the time that the resolution was adopted by the Board of Directors of the Company on June 25, 1930, directing the submission of the said Plan to the stockholders of the Company, or at the time that the Plan was duly approved by the stockholders of the Company; but allege that those Directors of the Company who were active employes of the Company or of its subsidiaries on January 28, 1931 were, as were other employes in ratio to their importance to the development of the Company's business and future prosperity, in a position to benefit by or participate in the allocation of 56,712 shares of its Common Stock B only in accordance with the resolution of the Board of Directors of the Company passed on said last mentioned date. 542

III. They admit that plaintiff was a stockholder of record of 200 shares of the Common Stock and 400 shares of the Common Stock B of the Company at the time of the commencement of this action, but allege that they are without knowledge as to whether he is the owner of said 200 shares of the Common Stock and 400 shares of the Common Stock B of the Company, and they allege that the 200 shares of the present Common Stock of which plaintiff is now the holder of record represent 50 shares of $100 par value Common Stock of which plaintiff was the holder of record on October 6, 1917, and they therefore deny that 543

he was a stockholder of record of said 200 shares of the Common Stock of the Company in 1916.

IV. They admit the allegations of paragraph 4 of the amended complaint.

V. They admit that on June 25, 1930, at a special meeting of the Board of Directors of the Company held in New York City, a resolution was duly enacted by which the program (Exh. C annexed to the amended complaint) was authorized to be submitted to the stockholders of the Company, but deny that such program "paved the way" for
545 the distribution to the directors, officers, and employes of the Company of 312,968 or any less number of shares of its Common Stock B at a nominal price wholly disproportionate to its market value.

VI. They admit that the program (Exh. C annexed to the amended complaint) contemplated the reduction in the par value of the Common Stock and Common Stock B of the Company from $50 to $25 a share, an increase in the authorized Common Stock of the Company to 2,000,000 shares at $25 par value and of the Common Stock B to 4,000,000 shares of $25 par value, an issue to all stockholders of 2 shares of new stock for 1 share of corresponding old stock, and the adoption of Employees' Stock Subscription Plan the purpose of which was to accord to such
546 employes of the Company and its subsidiaries and to those actively engaged in the conduct of its or their business, as may be selected as therein provided, by way of additional compensation for services to be rendered, an opportunity to purchase shares of its Common Stock B. They deny that said program contemplated the setting aside of those shares for distribution to the directors, officers, and certain employes of the Company as set forth in the amended complaint, but allege that said shares were to be available

as provided by the said Employees' Stock Subscription Plan set forth in the aforesaid Exhibit C.

VII. They deny that

> "As a condition precedent to submitting to the stockholders of the company for approval any plan for an issue or the sale and purchase of capital stock of the company to any or all of its employees, the Board of Directors of defendant company were required by Chapter 175 of the Laws of the State of New Jersey for the year 1920 to first formulate such plan and pass a resolution declaring that in the opinion of the board the adoption thereof was advisable." 548

and that Chapter 175 of the Laws of the State of New Jersey for the year 1920 required that all plans for the issue or sale of its capital stock to employees had to be in compliance with said statute, but they allege that Section 158(c) of the General Corporation Act of New Jersey, which is contained in and a part of said Chapter 175 of the Laws of 1920 of said State, provides:

> "The privileges and powers conferred by this Act shall be deemed to be in addition to and independent of any and all powers and authority conferred by any other law or laws, and not in restriction or limitation of any of the powers now permitted to corporations of this State." 549

They deny that the resolution referred to in paragraph 7 of the amended complaint was not adopted by a majority of a quorum legally qualified to vote thereon and that there was not present a quorum of directors legally qualified to vote upon said resolution at said meeting, and allege that all of the Directors present at said meeting have respectively subscribed to said new Common Stock B, that was

allotted to them under the Plan, at $25 a share in accordance with the subscription agreement set forth at pages 16 to 22, inclusive, of Exhibit G annexed to the amended complaint. They deny that said resolution was not legally adopted; that said resolution was not legally adopted by a majority of a quorum of disinterested directors; that said resolution was invalid, void, and of no effect; that the subsequent vote of stockholders was void and of no effect; and that the issue of stock thereunder for any purpose or at any price was invalid and void. They allege that at the time that said resolution was adopted by the Board of Directors there was no certainty or presumption that said
551 Plan would be approved by the stockholders, because the Directors were not then, or at the time that the resolution was submitted to the stockholders for their approval, or at any time since, majority stockholders of the Company; they allege further that there was no certainty or presumption that the Directors would be employes of the Company at the time the resolution was approved by its stockholders, or at the time that any stock under the Plan would be offered to employes; and that even if it be assumed that the Directors were interested at the time the resolution authorizing its submission to the stockholders was adopted by the Board of Directors, they deny that that interest would have invalidated or made illegal said Plan.

552 VIII. They admit that the stockholders were notified to take action upon the resolution for the modification of the capital structure, and the resolution of the Board of Directors which approved the Employees' Stock Subscription Plan (Exh. B annexed to the amended complaint) at a meeting of the stockholders announced to be held in Jersey City July 28, 1930; that Exhibit C annexed to the amended complaint is a copy of the notice to stockholders; but they deny that the resolution described in paragraph 8 of the amended complaint was invalid.

IX. They allege that they are without knowledge as to whether plaintiff was out of the United States at the time referred to in paragraph 10, and whether William Kennedy had proxies for any of the shares of stock controlled or represented by plaintiff and whether said Kennedy voted any of said represented or controlled stock at the meeting.

X. They admit that more than two-thirds of the stockholders of all classes present at the meeting described in paragraph 11 voted for such resolutions, and allege that there were present 389,573 shares of the Preferred Stock, 620,268 shares of the old Common Stock ($50 par value), and 1,220,855 shares of the Common Stock B ($50 par value), on which date there were outstanding 526,997 554
shares of the Preferred Stock, 778,548 shares of the old Common Stock ($50 par value) and 1,535,850 shares of the Common Stock B ($50 par value) entitled to vote, and that so much of the resolutions that dealt with the change in capital structure was carried by a vote of 389,553 Preferred shares and 620,024 Common shares ($50 par value), and that the resolution authorizing the Employee's Stock Subscription Plan was duly carried by the vote of 389,553 Preferred shares and 620,086 Common shares ($50 par value), and 1,218,849 of Common shares B of the Company and only 170 Common, and 1,995 Common B and 10 Preferred shares voted against said resolutions. They admit that since then the Common Stock and Common Stock B have been increased to 2,000,000 and 4,000,000 shares re- 555
spectively, and that two shares of said Common Stock and Common Stock B have been issued, respectively, to each stockholder for each share of $50 par value previously held by him, including the plaintiff, as specified in the first resolution adopted at said stockholders' meeting; and that an extra dividend of $4 per share, referred to in the letter of the President of the Company was duly declared by the Directors, paid to and accepted by the Common

Stockholders of the Company, including this plaintiff; and they allege that 56,712 shares of the Common Stock B have been set aside for subscription, in accordance with the resolution of the Directors, and pursuant to the provisions of the Subscription Agreement set forth in Exhibit G annexed to the amended complaint; and they deny that 312,968 shares of said stock have been set aside or distributed.

XI. Answering paragraph 12 of the amended complaint, they allege that the Directors voted that such resolution, therein described, to allot not in excess of an aggre-
557 gate of 56,712 shares of the Common Stock B to employes of the Company, was approved by the Directors in accordance with the terms of the Subscription Agreement referred to in Exhibit F annexed to the amended complaint, and that the subscription price for said stock was $25 a share, and that said stock so authorized to be allotted for subscription was part of the increase of Common Stock B of the Company authorized to be issued under the resolution increasing the Company's capital stock, and none of such stock was offered for subscription to Charles S. Keene, who at that time was a Director and not an active employe of the Company; and they allege that this was in accordance with the spirit and purpose of said allotment of stock—the late defendant Keene having arrived
558 at an age that made his future value to the development of the Company of questionable value through his age only and through no fault inherent in himself—this allotment not being made for past but for services to be rendered. They deny that the directors at said meeting had voted to sell said 56,712 shares to employes of the Company and they allege that they voted only to offer the same in accordance with said Plan.

XII. They deny that the Plan described in paragraph 15 of the amended complaint (Exh. B thereto annexed)

never in fact received the approval of the stockholders at the meeting held July 28, 1930; that the Plan was or is invalid; that said Plan did not authorize that the stock could be subscribed for at less than its actual or market value at the date that it was offered for subscription; that defendant George W. Hill construed said Plan as authorization or approval of a subscription to said stock at not less than its market or actual value at the time that the rights to subscribe were to be offered to the employes of the Company; that the adoption of said resolution referred to in said paragraph 15 by the stockholders was ineffectual; and that the allotment of said stock to the employes, including those employes who were officers and/or 560
directors of the Company, was and is a waste of corporate assets and an unlawful infringement upon the rights of the stockholders of the Company.

XIII. They deny that the said Plan (Exh. B) was illegal, *ultra vires,* or void, as set forth in paragraph 16 of the amended complaint or for any other reason, that either under the law under which the Company was organized or §1 of Chap. 195 of the Laws of New Jersey for the year 1917 the Company's said stock so allotted under the Plan could not be lawfully issued by the Company for services to be rendered under the terms, provisions, and conditions therein contained, and that said stock so allotted under the Plan could only be lawfully issued by the Company for the amount it actually pays for labor 561
performed.

XIV. They deny that the allotment of said Common Stock B, pursuant to the Employees' Stock Subscription Plan (Exh. B) was in violation of any of the rights of the plaintiff or of any other stockholders of the Company, or a violation of its charter or the laws of New Jersey referred to in paragraph 17 of the amended complaint, and

that such allotment to the employes of the Company, including those employes who are directors and officers was or is in violation of any pre-emptive right of any of the stockholders of the Company under said law or any other law of the State of New Jersey, and that such allotment, pursuant to the terms of the Employees' Stock Subscription Plan (Exh. B), is illegal, void, and an unlawful infringement upon the rights of any of the stockholders of the Company; that §124 of the General Corporation Law of New Jersey as added by §116, Chap. 318 of the Laws of 1926 has any application to stock issued under the Plan.

563 XV. They deny that the Plan (Exh. B) was or is illegal, *ultra vires,* and void because it provided that the Board of Directors may offer and allot such stock for subscription to "such of the employees of the Corporation [Company] and/or its subsidiaries and those actively engaged in the conduct of its or their business as may be selected in accordance with the plan," or because of any other reason, and they allege that Section 158 of the General Corporation Act of New Jersey, to which paragraph 18 of the Amended Complaint apparently refers, provides that such stock could be issued to any or all of its employes, and that 535 employes were selected by the Board of Directors, including all directors save Charles S. Keene, who was not an active employe, after a thorough
564 investigation by the Board of Directors into their value to the Company; that at a special meeting of the Directors held on Jan. 28, 1931, at which neither the defendant Hill nor the late Charles A. Penn was present, the Board of Directors authorized that, for the information of and to assist the President in making a report and recommendation, there shall be transmitted to the President a list of employes and persons actively engaged in the conduct of the business of the Company and its subsidiaries who in

the opinion of the Board should be given consideration in determining the individuals to whom stock should be allotted, together with a statement relative to the services rendered by them, and with an estimated rating, on a percentage basis, of the value of their services to the Company, as compared in each department with a key executive in such department and the annual rate of compensation of each as of December 31, 1930, including all salary and other compensation of any kind however designated, and whether paid or accrued, and that the Board recommended to the President that in determining the number of shares to be allotted to each individual there shall be used as a general basis a number of shares of stock having 566
an aggregate par value equal to 33⅓ per cent. of the amount of compensation paid or accrued to such individual for his services to the Company and/or its subsidiaries for the calendar year 1930, including all salary at the annual rate of salary of such individuals as of December 31, 1930, and all other compensation of any kind however designated, and whether paid or accrued; and the Directors of the Compan[illegible] at that meeting duly resolved "that in view of the unusual ability and efficiency of the President, George W. Hill, particularly in connection with sales as well as in the general oversight and supervision of all the activities of the corporation [Company] and its subsidiaries and in view of the unusual ability and efficiency of Vice-President Charles A. Penn in connection with the manufacturing activities of the Company, this 567
Board recommends that the said George W. Hill and Charles A. Penn be given recognition on the basis of 100 per cent. rating of the value of their services to this corporation [Company], as indicated on the list hereinabove referred to"; and, therefore, they deny that the President of the Company selected himself as one of those entitled to subscribe to the stock so to be allotted.

XVI. They deny that the Plan referred to in paragraph 19 of the amended complaint was or is abortive and illegal; that the arrangements described in paragraph 19 are illegal and void for any of the reasons theretofore set out in the previous paragraphs of the amended complaint, or that such arrangements were or are void for any other reason; that the resolution of the Board of Directors of the Company approving the said transaction was void and of no effect; that said resolution was not passed by a quorum of disinterested directors; that the arrangement with the Guaranty Trust Company (Exh. G, pp. 23-28) was a sale to and purchase by the Guaranty Trust Com-
569 pany or that it is contrary to the Plan, and they allege that Section 158 of the General Corporation Act of New Jersey specifically provided that the stock could be issued to trustees on behalf of any or all employes of the Company to whom such stock may be allotted; they deny that Junius Parker, Louis Levy, and Ivy Lee are not employes of the Company; that Junius Parker was disqualified to act as a trustee; that the Plan (Exh. B) prevented the carrying out of the arrangements therein provided through trustees; that the issue of said stock under the Plan was in violation of Section 1 of the Laws of New Jersey of 1917, Chapter 195; that the declarations in the various resolutions passed by the Board of Directors referred to in said paragraph 19 of the amended complaint—that the
570 stock which was offered to employes at $25 per share by way of consideration for services to be performed from January 30 to December 31 of this year—was and is a mere pretext and attempted cover for an illegal act and itself a badge of fraud upon the part of the Directors approving the same. They allege that said Plan and everything done thereunder was and is legal and authorized by Section 158 of the New Jersey General Corporation Act as well as other laws of the State of New Jersey.

571

XVII. They deny that any of the matters set forth in paragraph 20 of the amended complaint show any fraud; they deny that any of the shares of stock have been distributed to the defendants Hill, Penn (now deceased), Mower (who resigned on July 31, 1931), Neiley, Riggio, Harvie, Boylan, Fletcher (who resigned on June 13, 1931), Taylor, and Parker, or to any of the other officers or directors of the Company or to any other employes of the Company; they admit that Exhibit H is a list of the subscribers to the stock authorized to be allotted under the Plan and allege that the right to subscribe was offered only to those employes who in the judgment of the Board of Directors, after careful consideration, would best advance the interest of the Company and its stockholders, and that nothing, within any of the Laws of New Jersey or in the resolution of the stockholders approving the Employees' Stock Subscription Plan or said Plan, required the Directors to offer to the rank and file of the thousands of employes of the Company the right to subscribe, and that no stockholder of the Company can determine or has the authority to determine which of the thousands of the Company's employes shall be granted the right to subscribe to such stock.

572

XVIII. They deny that there was any indirection, deceit, or suppression of the truth upon the part of the Directors in connection with the adoption of the Stock Subscription Plan or the allotment of the 56,712 shares of stock pursuant to the Plan and that any of the matters set forth in paragraph 21 show indirection, deceit, or suppression of the truth on the part of the Directors of the Company, or any of them, and that no stock has yet been sold to any of the employes of the Company under the Plan, but allege that 56,712 shares have been allotted in accordance with the Plan and in accordance with the agreements set forth in Exhibit G (pp. 16-22, 23-28) annexed to the amended complaint.

573

Answering subdivision (a) of paragraph 21, they allege that the free medical service rendered to the employes and the payment of pensions to deserving employes, as therein described, were matters within the power of the Board of Directors of the Company, and that such service and payments were for the best interests of the Company and were in the form of additional compensation to those employes who received the benefits thereof, that such practices helped to maintain the morale and efficiency of the employes, and that the application of the Company's funds for such purposes, in accordance with a policy which has been pursued for many years, is justified, proper, and for
575 the best interests of the stockholders and the Company.

Answering subdivision (b) of paragraph 21, they allege that said By-Law, Article XII (which By-Law is in all respects valid and legal) therein described, was duly adopted at a stockholders' meeting held on March 13, 1912, more than five years before plaintiff became a stockholder of record of the Company of any shares of its Common Stock of which he is now the holder of record; that the vote in its favor was 621,047 shares and the vote against its adoption 35 shares, the outstanding stock of the Company at that time consisting of 945,427 shares, of which 402,424 shares were Common Stock of the par value of $100 each and 543,003 shares of Preferred Stock of the par value of $100 each; that the services rendered by de-
576 fendants Hill, Mower, Neiley, Riggio and the late defendant Penn for the year 1930, to the Company, were of a far greater value than the amounts paid therefor, and that payment for such services for the year 1930 was contemplated by the Company to be made under contract by those officers with the Company; that such compensation was agreed to be paid for services that were unique and extraordinary; that said By-Law, Article XII, could have been repealed by the action of the stockholders of the Company; that the stockholders have never exercised their

right or power to repeal said By-Law; that a meeting to repeal said By-Law could have been called by any three or more stockholders pursuant to the provisions of Section 46 of the General Corporation Act of New Jersey.

Answering subdivision (c) of paragraph 21, they allege that the stock so allotted to persons therein named was without ultimate cost to the Company; that the shares of stock allotted thereunder were allotted by Mr. Junius Parker, Chairman of the Board, Mr. Geddes, and Mr. Perkins, none of whom participated in the allotment, but all of whom were Directors of the Company; that simultaneously with the execution of the guarantees in said subdivision described, the Company notified the respective 578
banks to which the said guarantees ran that "notwithstanding the fact that payments on said notes may be made from time to time * * * we authorize you to surrender collateral to and only to the Treasurer or Assistant Treasurer at the time of said delivery, of The American Tobacco Company;" that the agreement made between each allottee and the Company recited what was the fact, that he "is a valued employe of the Company, and it is to the interest of the Company that he should be more largely interested in the permanent success and prosperity of the Company, and should continue in the service of the Company for a substantial time, subject to the Company's right in any proper legal way, unaffected by the provisions of this agreement, to dispense with such service, * * *;" that 579
said agreement provided also that only one-fifth of the stock allotted should be taken up in one year; that said agreement contemplated the continuance of the allottee with the Company for a period of five years; that all of the employes so allotted stock by the Committee remained with the Company for a period of five years after the date of the allotment with the exception of Mower and Harwood; that said Mower resigned on July 31, 1931 (approximately one month before the termination of the five-

year period); that said resignation of Mower was due to ill health, brought about by his constant application to the exacting duties that were entailed upon him in the development of the English branch of the business; that said Mower, because of his devotion to the Company, continued for the last year of his employment contrary to the advice of his physicians; that Harwood resigned on September 18, 1930; that all of said allottees rendered services far more valuable to the Company than any compensation they received from the Company during that period; that the arrangement so made was fair, honest, and reasonable in all respects.

581 Answering subdivision (d) of paragraph 21, they allege that the transactions therein set forth were made with the complete knowledge of the Board of Directors; that said transactions were carried out without any ultimate cost to the Company; that no profit on any of such stock has been realized by the appearing defendants; that all of the allottees of said stock still own the stock that they so acquired in October, 1929, except a small fraction that has been sold by one of said allottees at a loss, whereas plaintiff upon information and belief on or about June 25 or 26, 1930 when the Common Stock ($50 par value) and Common Stock B ($50 par value) were at nearly their highest market quotations on the New York Stock Exchange, sold 500 shares of the old Common Stock ($50 par value), which represent 1,000 shares of the present
582 Common Stock, and 1,000 shares of the old Common Stock B ($50 par value), which represent 2,000 shares of the present Common Stock B, at a very substantial profit and retained only those shares which he asserts give him the status of a stockholder in bringing this and other suits against the Company's management which enabled him to make that large profit; that since the commencement of this action the said stock has sold for a price which was the equivalent of $143 to $149 per share; that the Directors

of the Company, in authorizing the sale to stockholders of 390,583 shares of the old Common Stock B at $125 a share, were acting for the best interests of the Company and its shareholders in granting them rights which were considered most valuable, which rights the stockholders did not have to exercise, and which issue of stock to the stockholders, pursuant to the approval of the stockholders, had no relation whatsoever to the allotment of stock that had been bought in the open market by the Company and allotted to the valued employes, among whom there were included directors and officers of the Company; that amongst those who subscribed to the additional Common Stock B offered at $125 a share to the stockholders of the 584
Company was this plaintiff, who, upon information and belief, subsequently sold the stock so purchased on or about June 25 or 26, 1930, at a profit of approximately $105 per share; that the bank loans did not in any way hamper or impede the operations of the Company or the conduct of its business, but that on the contrary, for the year 1930, the Company's net profits, after the payment of all taxes, including the sum of over $150,000,000 to the Federal Government, were $43,345,370 (which profits were greatly in excess of the profits of previous years); that said increase in profits was in large measure due to the valuable services that were rendered by the allottees, and said allotments were made in contemplation of services that were to be rendered and in part to be paid thereby.

Answering subdivision (e) of paragraph 21, they allege 585
that the allocation of the moneys described in said subdivision, to-wit, the sum of $262,739.14 for the year 1929 and $698,348.28 for the year 1930, was in fact additional compensation for services rendered by the allottees; that such allocation was within the power of the Board of Directors who had exercised their discretion in good faith and for the best interests of the Company and its stockholders; that the compensation so paid to them tended to

increase the efficiency, loyalty, faithfulness, activity, and energy of the allottees in the conduct of the business of the Company, and the services so obtained thereby resulted in a profit to the Company for the year 1930 and a distribution to stockholders for the year 1930 far exceeding that which had taken place in any previous year; that the Board of Directors, in their discretion, deemed it beneficial to the interests of the Company and its stockholders to use the moneys so saved in the manner and in the form that they were used; that all of said allottees rendered services far more valuable to the Company than any compensation that they received from the Company during that period.

587 Answering subdivision (f) of paragraph 21, they deny that the resolutions and the stock subscription plans therein referred to were without authority of law and contrary to the terms of the Company's charter, and they allege that the first of said resolutions came into effect three years prior to the time that plaintiff became a holder of record of the Common Stock of the Company, of which he was a holder of record at the time of the commencement of this action; that Exhibit T annexed to the amended complaint was one of ten Preferred Stock plans which took effect commencing 1917; that the difference between the cost to the Company of the Preferred Stock involved in those ten plans and the purchase price to the employees for a period of thirteen years was not in excess of $130,000; that such

588 expense was a legitimate expense, in the discretion of the Directors, in the operation and conduct of the Company's business, which resulted in the stimulation of the loyalty, faithfulness, activity, and energy of the employees and gave them a real interest in the business of the Company (by making them part owners of its business) beyond that which reasonably would be expected if fixed compensation only had been paid to such employes; that such stock allotments helped build up the *esprit de corps* of the organization; and tended to make the employes less waste-

ful of materials and more watchful of the interest of the Company; and tended to hold the experienced employes in service when employment was plentiful and employes scarce; and helped to reduce the annual turnover of labor, thereby making for permanence in the personnel of the employes, and avoided the necessity of and loss incurred in training new recruits; and built up the average skill and efficiency of all those employed. So much of the fund described in said subdivision as was made available to cover extra compensation to the employes, and so credited,—provided the employes continued with the organization during the period that the credits were earned,—was made by the Board of Directors in the exercise of 590
their discretion, acting in good faith and for the best interest of the Company and of its stockholders. The services rendered by the allottees were reasonably worth more than the compensation paid them for those years, irrespective of the form of the compensation. As a result of the policy so pursued by the Directors of the Company, the payments of compensation so made to the allottees have resulted in those allottees taking an interest in the Company, its affairs and its welfare, and such payments have succeeded in increasing the amount of the Company's business, the amount of the Company's profits, the amount of distribution to the Company's stockholders, the amount of its reserve and surplus during a period when most of the corporations in the United States were meeting with de-
591
creased business, decreased profits, decreased payments to their stockholders and decreased surpluses.

XIX. Answering paragraph 22 of the amended complaint, they allege that plaintiff, who became a stockholder of the Company five years after Article XII of the By-Laws was adopted by the stockholders, was bound by the provisions of that By-Law and is conclusively presumed to have knowledge thereof; that all of the stockholders of the Com-

pany could have determined from the annual reports submitted to them by the Company the maximum amount of compensation that could have been paid to the President and five Vice-Presidents of the Company by the application of the formula provided for by Article XII of the By-Laws of the Company; that no statements were sent to stockholders of the amount of compensation paid to the employes of the Company, because the Directors, in their discretion, did not deem it for the best interest of the Company to advise its competitors of the amounts being paid to the different important men in the Company, because the tobacco industry is a highly competitive field in
593 which any information affecting any company in the industry is sought by all of the large corporations engaged therein; that such information has already been used to the detriment of the Company and its stockholders in that salesmen of the Company's competitors have attempted to destroy the goodwill of the products of this Company by unfair and improper references to the compensation being paid to the officers of this Company; that the directors of the Company in their discretion did not deem it advantageous to the successful operation of the Company to apprise the employes of the compensation that was being paid to other employes, as such information would tend to make the employes dissatisfied and jealous of one another and thereby destroy the morale which the directors
594 were trying to maintain, which morale was essential to obtain the greatest benefit for the Company and its stockholders.

AS A FIRST SEPARATE DEFENSE

DEFENDANTS ALLEGE THAT

XX. The Employees' Stock Subscription Plan (Exh. B annexed to the amended complaint) was duly authorized by the stockholders of the Company pursuant to and in

conformity with the provisions of §§158 and 158(a) of the General Corporation Act of New Jersey (Laws of New Jersey, 1920, Chap. 175, §§1 and 2).

XXI. Such authorization was made at a stockholders' meeting duly held on July 28, 1930; that there were outstanding on that date 526,997 shares of Preferred Stock (par value $100), 804,848 shares of the Common Stock (par value $50) and 1,538,873 shares of the Common Stock B (par value $50), of which shares there were present Preferred 389,773, Common 620,284, and Common Stock B, 1,220,855 shares, and of the shares so present there were voted in favor of the resolution authorizing the said Plan (Exh. B) 389,573 Preferred, 620,086 Common, and 1,218,848 Common B. Thus, the resolution was duly adopted by holders of more than two-thirds of the outstanding stock of the Company as required by the laws of the State of New Jersey. 596

XXII. By §158(b) of the General Corporation Act of New Jersey (Laws of 1920, Chap. 175, §3) it is provided that any plan adopted in conformity with the provisions of §§158 and 158(a) of the General Corporation Act "may be recalled, abolished, revised, amended, altered or changed in the same manner as herein provided for its adoption."

XXIII. Plaintiff possessed the right at all times and still possesses the right, pursuant to the provisions of §46 of the General Corporation Act of the State of New Jersey (Laws of 1896, Chap. 185, §46 thereof), to call a meeting to recall that Plan (provided he is joined by two other stockholders) by publishing ten days' notice of the time, place, and purposes of the meeting, in a newspaper published in the county in which the Company has its principal office in the State of New Jersey, and mailing such 597

notice to all stockholders whose post office addresses are known or can be ascertained.

XXIV. The Directors of the Company and the individual defendants did not at the time of the stockholders' meeting, nor do they now, own or control a majority of the outstanding shares of the issued stock of the Company.

XXV. Plaintiff by this action seeks to undo what the great majority of stockholders of the Company have directed should be done, but has failed to make any effort to obtain that relief from the stockholders of the Company; even though plaintiff with two other stockholders
599 could have called a meeting for such purpose, as hereinbefore stated, under the laws of the State of New Jersey.

XXVI. By reason of the matters set forth in this defense, plaintiff has failed to comply with the provisions of Federal Equity Rule 27.

AS A SECOND SEPARATE DEFENSE

DEFENDANTS ALLEGE THAT

XXVII. On April 1, 1931 the annual meeting of the stockholders of the Company was duly held in accordance with its By-Laws at Jersey City, New Jersey, to elect directors for the ensuing year.

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XXVIII. Prior to said meeting, to wit, January 28, 1931, a public announcement was distributed by the Company to the press for publication and was so published by many of the leading newspapers of the United States, that the Directors of the Company had voted to allot 56,712 shares of the Company's Common Stock B pursuant to the authority conferred upon them under the Employees' Stock Subscription Plan, as a result of which, upon information and belief, stockholders owning hundreds of

thousands of the Company's shares of all classes were apprised of the allocations made.

XXIX. Thereafter, and on or about March 12, 1931, there was mailed to each stockholder of record of the Company a statement relative to the Employees' Stock Subscription Plan, which statement is annexed to the amended complaint as Exhibit G. In that statement attention was directed to Article XII of the By-Laws and the fact that compensation would be taken into account in making allotments under the Plan, including money compensation of every kind, whether fixed salary or contingent compensation, including the compensation due the President and five Vice-Presidents, under Article XII of 602
the By-Laws which was adopted by vote of the stockholders of the Company in 1912.

Said statement (Exh. G) submitted to the stockholders stated that, of the shares to be allocated, the President was allotted 13,440 shares and the five Vice-Presidents 16,685.

The statement set forth also the agreement under which the stock was offered for subscription under the Employees' Stock Subscription Plan between the Company, the respective employes, and the trustees, from which it appears that the stock was not to be delivered by the trustees to the participants until the purchase price of the stock and all interest thereon should have been paid in full and, in any event, not to be delivered to the par- 603
ticipant until after December 31, 1931, and that if, "prior to December 31, 1931, the connection of the Participant with the Company or any subsidiary, as the case may be, is severed by discharge either with or without cause, or resignation, or in any manner other than death, so that he is no longer in the employ of the Company, * * *" then in such event the "Subscription Agreement and all rights of the Participant hereunder shall forthwith be subject to cancellation at the election of the Trustees, * * *."

XXX. Prior to said meeting, plaintiff, upon information and belief, caused to be inserted advertisements in a newspaper or newspapers circulated throughout the United States wherein he voiced his criticism of the management of the Board of Directors and their actions in connection with the Employees' Stock Subscription Plan as well as the payments made under Article XII of the By-Laws and solicited proxies for the meeting to be held on April 1, 1931. Prior to said meeting, there appeared in many newspapers throughout the United States what purported to be an interview between plaintiff and reporters of various newspapers, in which interview plaintiff criticized
605 the Board of Directors of the Company and, upon information and belief, said interview was so given by the plaintiff for the purpose of obtaining proxies at such annual meeting.

So widespread was the publicity as a result of the information that was conveyed by plaintiff to the reporters which instigated newspaper articles, editorials and other comments upon the amount of the compensation that was received and would be received by some of the defendants, that, upon information and belief, nearly all of the stockholders of the Company not only were thus fully informed as to the Employees' Stock Subscription Plan, its operation and effect, as well as to the contingent compensation provided by Article XII of the Company's By-Laws as in-
606 deed all of the stockholders had been informed by the aforesaid notice, referred to in paragraph XXIX herein, sent to them by the Company. They were also informed by such publicity that the Plan and the contingent compensation provided by Article XII of the Company's By-Laws were under attack by the plaintiff.

XXXI. At the said stockholders' meeting of April 1, 1931, plaintiff was present in person. At that meeting among the candidates for election were all the Directors who had been allotted participation under and pursuant to the Employees' Stock Subscription Plan.

Plaintiff announced, prior to the balloting at that meeting, that he was voting against the election of the defendant Hill, nominating one J. J. McGlone as director in place and stead of said defendant (said McGlone having had no experience in the tobacco business, having been engaged for a number of years in the steamship business and for a period of about twenty years had been an official of a steamship company). Plaintiff stated at that meeting that he did not know the nature of said McGlone's business.

Upon information and belief, plaintiff voted for all of the Directors so nominated, with the exception of defendant Hill.

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The inspectors of election certified that there were 23,520,228 votes cast on 345,973 shares of Preferred Stock, and 20,917,723 votes cast on 1,240,750 shares of Common Stock, which votes were cast for the following as Directors of the Company:

	Number of Votes.
Messrs. Richard J. Boylan	2,608,401
John K. Fletcher	2,615,973
C. Huntley Gibson	2,615,973
Patrick H. Gorman	2,616,035
John G. Hager	2,615,973
Paul M. Hahn	2,615,973
Tullis T. Harkrader	2,615,973
James B. Harvie	2,615,973
George W. Hill	2,608,201
Charles S. Keene	2,615,973
James E. Lipscomb, Jr.	2,615,973
Arthur C. Mower	2,608,401
Charles F. Neiley	2,615,973
William H. Ogsbury	2,615,973
Charles A. Penn	2,608,401
Vincent Riggio	2,608,401
Thomas R. Taylor	2,608,401
J. J. McGlone	11,980

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The number of votes cast for the reelection of the Board at that meeting was the largest number of votes ever cast at any annual meeting in the history of the Company.

All of the candidates were elected as Directors, except the said J. J. McGlone, who Mr. Rogers announced was "intended as a replacement of Mr. George W. Hill." The act of electing those candidates was in fact a reelection of the Board of Directors which included those Directors who as employes had been allotted subscriptions under the Employees' Stock Subscription Plan.

XXXII. Plaintiff well knew, as did all of the stock-
611 holders who voted in favor of the reelection of those Directors, that unless they were reelected for the year 1931 their connections with the Company could have been severed, thereby enabling the trustees to have terminated the subscription agreements for stock under the Employees' Stock Subscription Plan, whereas, by reelecting said Directors, the stockholders of the Company made it possible for those Directors to obtain the benefits under the aforesaid Plan.

XXXIII. By reason of the matters in this defense set forth, the stockholders of the Company, including plaintiff, have ratified the action of the Board of Directors in the allotments made to the members of the Board of Directors under the Employees' Stock Subscription Plan.
612

As a Third Separate Defense

Defendants Allege That

XXXIV. The matters set forth in the amended complaint and the relief sought by the plaintiff involve matters of internal management of the Company which involve the construction of New Jersey statutes and New Jersey laws.

XXXV. This action was commenced in the Supreme Court of the State of New York and thereafter removed to this Court. The Courts of the State of New York decline to take jurisdiction of actions which seek to regulate the internal affairs of a foreign corporation which are dependent upon the laws and direction of the Courts of the State in which such a corporation was organized.

XXXVI. By reason of the matters in this defense set forth, this Court should decline to take jurisdiction of this action.

AS A FOURTH SEPARATE DEFENSE

614 DEFENDANTS ALLEGE THAT

XXXVII. On July 19, 1907, the United States commenced an action against the Company, twenty-nine individual defendants, sixty-five American corporations, and two English corporations (*United States* v. *The American Tobacco Company, et al.*), the object of which was to prevent the continuance of alleged violations of the first and second sections of the Anti-Trust Act of July 2, 1890.

XXXVIII. The principal defendant was the Company. The Government contended in its complaint, that by the control which the Company exercised over the other corporations named as defendants through either direct or indirect stock ownership, the Company had a virtual 615 monopoly over the entire tobacco industry of the United States.

XXXIX. On May 29, 1911, the Supreme Court of the United States issued its mandate whereby the Court below was directed to ascertain and determine "upon some plan or method of disolving the combination and of recreating, out of the elements now composing it, a new condition

which shall be honestly and in harmony with and not repugnant to the law."

XL. On October 16, 1911, the defendants filed in the Circuit Court of the Southern District of New York a petition proposing a plan of dissolution of the combination pursuant to the mandate of the United States Supreme Court. After hearing objections, the Circuit Court duly entered a decree, dated November 16, 1911, provided for (1) a division among four companies of the former domestic tobacco business of the Company, and (2) the disintegration of accessory companies.

617 XLI. The decree required the Company to divide the domestic manufacturing assets and business controlled by it among four companies, to wit, The American Tobacco Company (Company), Liggett & Myers Tobacco Company (a newly formed company), P. Lorillard Company (a newly formed company), and the R. J. Reynolds Tobacco Company. The decree was estimated by the Circuit Court "to provide for a division of the then business in tobacco and its products among the various manufacturers as follows:

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DIVISION OF VOLUME AND VALUE OF BUSINESS

	Division of Volume and Value of Business Pursuant to the Decree		Percentage of Business Controlled by American Tobacco Company Prior to Decree
	Percentage in Volume (Lbs. or Thousands)	Percentage in Value	
Cigarettes			
American Tobacco Co.	37.11	33.15)	
Liggett & Myers	27.82	21.03)	
Lorillard Co.	15.27	26.02)	80 (approx.)
Others never in any way connected with the combination	19.80	19.80)	
Smoking Tobacco			
American Tobacco Co.	33.08	40.53)	
Liggett & Myers	20.05	16.47)	
Lorillard Co.	22.82	18.88)	
Reynolds Tobacco Co.	2.66	2.73)	79 (approx.)
Others never in any way connected with the combination	21.39	21.39)	
Plug Tobacco			
American Tobacco Co.	25.32	22.98)	
Liggett & Myers	33.83	37.84)	
Lorillard Co.	3.73	4.64)	
Reynolds Tobacco Co.	18.07	15.49)	80 (approx.)
Others never in any way connected with the combination	19.05	19.05)	
Fine Cut Tobacco			
American Tobacco Co.	9.94	13.54)	
Liggett & Myers	41.61	36.26)	
Lorillard Co.	27.80	29.57)	80 (approx.)
Others never in any way connected with the combination	20.65	20.65)	
Cigars			
American Cigar Co.	6.06	8.90)	
Lorillard Co.	5.72	2.88)	
American Stogie Co.	1.58	1.58)	13 (approx.)
Others never in any way connected with the combination	86.64	86.64)	
Little Cigars			
American Tobacco Co.	15.43	13.41)	
Liggett & Myers	43.78	38.69)	
Lorillard Co.	33.84	40.95)	93 (approx.)
Others never in any way connected with the combination	6.95	6.95)"	

XLII. The Company met with severe competition from the newly created companies and R. J. Reynolds Tobacco Company. The latter entered the cigarette field after the disintegration of the Company. The result of that competition was to reduce the percentage of cigarettes sold by the Company, so that by 1925 the percentage of cigarettes that it sold in the United States had fallen to 21.80%.

XLIII. In December of 1925 the then President of the Company died, and in December, 1925, defendant Hill was elected to the Presidency of the Company. Under his
623 management and in cooperation with the late defendant Penn and the other members of the Board of Directors, most of whom were employes of the Company, a completely new and different policy was inaugurated in all of the departments. A radical change at that time was required because the Company had lost its leadership in the tobacco industry and, in fact, was subordinate to the position held by R. J. Reynolds Tobacco Company.

XLIV. As a result of the services rendered by the defendants under the leadership of defendant Hill, the following results were achieved:

(a) GAIN IN SALES OF CIGARETTES

624

Year	Percentage
1926.....	20.14%
1927.....	22.44%
1928.....	29.59%
1929.....	34.16%
1930.....	38.10%

(b) NET EARNINGS OF THE COMPANY AFTER DEDUCTING ALL CHARGES AND EXPENSES FOR MANAGEMENT, TAXES, ETC.

Year	Amount
1924.....	$20,839,694
1925.....	22,288,596
1926.....	22,549,094
1927.....	23,309,689
1928.....	25,000,060
1929.....	30,231,348
1930.....	43,294,769

(c) DIVIDENDS ON COMMON STOCK 626

Year	Amount
1924.....	$12,202,675
1925.....	16,109,922
1926.....	15,622,486
1927.....	15,622,856
1928.....	15,623,172
1929.....	21,091,536
1930.....	29,294,000

In the first quarter of 1931, beside the regular dividend of $1.25 per share, an extra dividend of $1.00 per share was declared. The total dividends paid so far for the year 1931 exceed $28,300,000.

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XLV. Prior to 1926 the Company distributed its advertising expenditures among all its products. They included the following brands amongst others:

Smoking Tobacco Brands

Lucky Strike	Bull Durham
Tuxedo	Five Brothers
Peerless	Old English

Plug Tobacco Brands

American Navy	Ivy
Square Deal	Corker
Spear Head	Town Talk
Piper Heidsieck	Newsboy
Standard Navy	

Cigarette Brands

Sweet Caporal	Hassan
Pall Mall	Mecca

629 *Little Cigar Brand*

Sweet Caporal

Fine Cut Brand

Virgin Leaf

Beginning in 1916 the trade name or brand "Lucky Strike" which up to that time had been used only for tobacco was for the first time used for the cigarette which is now the well-known Lucky Strike cigarette.

XLVI. Defendant Hill together with the late defendant Penn evolved the LUCKY STRIKE cigarette; the latter, who was in charge of manufacturing and was during his life-
630 time one of the greatest authorities upon tobacco and mechanics of manufacturing in the United States, worked out the blend and defendant Hill designed the package in which the new cigarette was to be sold.

XLVII. The Lucky Strike cigarette was the first blended cigarette manufactured by the Company, which had theretofore been manufacturing and selling cigarettes made only of Virginia or Turkish tobacco.

XLVIII. Thereupon, and under the guidance of defendant Hill, the Company proceeded to concentrate upon the exploitation of the Lucky Strike cigarettes.

XLIX. Upon defendant Hill's election to the Presidency, and under his guidance, the Board of Directors of the Company instituted a complete reorganization of the many departments of the Company. This has resulted in the Company functioning in the following manner:

(a) Defendant Hill, as Chief Executive of the Company, has general supervision of all its departments, including sales, advertising, foreign operations, manufacturing, exporting, auditing, purchasing of leaf tobacco, etc. 632
That supervision involved and involves more than mere cursory passing upon the functioning of those different departments; it involved and involves an actual participation in the programs of those departments, and particularly in those branches of the Company that are of paramount importance in its development.

One of the chief functions and responsibilities resting upon defendant Hill is that connected with advertising, which entailed an expenditure in 1930 of $20,470,758.43. That amount was part of the expenditure that had to be recouped, and was recouped, by the Company before the net profit in excess of $43,300,000 was made for the year 1930.

The advertising is divided into six different depart- 633
ments, or branches, to wit:

Newspaper copy
Magazine advertisements
Displays
Lucky Strike radio hour
Publicity, and the
Cremo radio program.

The formula or plan for newspaper advertising, which is the basis of the advertising program, is originated by a board of which the defendants Hill and Riggio are members. This board has originated some of the slogans which have helped create the demand for LUCKY STRIKE cigarettes and which are worth today incalculable amounts.

One of the most important branches of the tobacco industry is the purchasing of tobacco. Defendant Hill has a thorough knowledge of all the varieties of tobacco. At an early stage of his career he had his experience in the tobacco fields where he acquired first hand knowledge of the manner in which tobacco was grown, and the ability
635 to select the proper kinds. In connection with the purchasing of tobacco, the requirements of the Company are such that plans must be made far ahead to take care of its needs. In order to accomplish this properly, defendant Hill has instituted a Committee on Leaf Tobacco. This Committee plans the buying schedule to take care of its entire needs. That Committee was composed during the lifetime of Mr. Penn, of the defendants Hill and Neiley and the late defendant Penn. This Committee coordinates with and cooperates with the Sales Department. The tremendous increase each year of the needs of the Company must be anticipated. This involves more than an anticipation of the next year's production because it takes at least 2 years or more to place tobacco in such condition that
636 it can be used in the different products manufactured by the Company. This leaf buying under the leadership of defendant Hill is of tremendous importance and value to the Company.

Lucky Strike cigarette is the finest blended cigarette sold in the market. In order to maintain that high degree of excellence, it is necessary to keep in daily contact with the variations in the tobacco crops. At one time, tobacco from a certain territory may be of the character that will fit into the blend and the next season tobacco from that

territory may sustain a change including either an increase or decrease in some of its constituents or a change in quality making it unsuitable for use in the blend. The Leaf Committee under the direction of the defendant Hill performs the important function of maintaining the high quality of the blend which is so essential to the success of the Company.

Defendant Hill is in frequent communication with London to receive the reports of the English branch of the Company's business, in order to be fully apprised of all of its important matters enabling him to make suggestions and give necessary orders with respect to its operations. That the English operations have become so large 638
in volume and in such a condition that the defendant Riggio has been selected to supervise them since the resignation of defendant Mower but that during the growth of the English business which increased from 365,000 cigarettes per day to over 12,000,000 cigarettes per day, defendant Hill by means of weekly telephone instructions to defendant Mower gave definite plans and advice which resulted in the attainment of that tremendous growth which happened in England during the period when that country was in the throes of a severe depression, and in fact was suffering a loss of financial prosperity which resulted in an increased application of the dole and the departure from the gold standard.

The defendant Hill's working hours have not been the working hours of the average employe of the Company, 639
that is, from nine to five; in addition, he devotes night after night to the origination of advertising slogans, to the development of sales programs, to the development of manufacturing devices, to communication with other executives of the Company, either by telephone or by personal conference, for the benefit of the Company. He has instituted economies that have saved the Company in the past and are saving it at the present time, millions

of dollars a year. The services that have been rendered by defendant Hill have been extraordinary and unique to such an extent that there could be no one man found in this country who could perform all the functions which he performs. At no time has the compensation received by the defendant Hill been greater than the fair and reasonable value of the services rendered by him for the period for which such compensation was paid, and the compensation now being received by said defendant, including the benefits under the Employees' Stock Subscription Plan, is not greater than the fair and reasonable compensation for the services now being rendered by him.

641 (b) Upon the disintegration of the Company, it retained the following factories:

Durham, N. C.	(Blackwell's Durham Tobacco Co.)
New York	(Butler-Butler, Inc.)
Milwaukee, Wis.	(F. F. Adams Tobacco Co.)
Danville, Va.	Danville Branch—little cigars
Baltimore	Ellis A—little cigars
New York	Duke Branch
Baltimore	Felgner Branch
Louisville	Finser Branch
New York	Kinney Branch
Baltimore	Marburg Branch
Richmond	Mayo Branch
642 Nashville	(Nashville Tobacco Works)
Richmond	(R. A. Patterson Tobacco Co.)
Brooklyn	Penn Street Branch—cigarettes
Reidsville, N. C.	(F. R. Penn Tobacco Co.)
Middletown, Ohio	Sorg Branch
Louisville	National Branch

where the manufacturing of tobacco took place.

The manufacturing of tobacco was in charge of the late defendant Penn, with whom the defendant Neiley coordi-

nated. They instituted a policy of concentration in manufacturing, which resulted in the elimination of all factories but those situated at Durham, Louisville, Reidsville, Richmond and Nashville.

The Richmond factory is the last one built. The building of that factory was planned and supervised by those defendants, and is considered the best of its kind in the tobacco industry.

They have also concentrated the leaf handling and stemming operations. As a result of their services, a uniformity of production and economy of manufacture have been effectuated, so that the cost of producing cigarettes has been constantly reduced. One of the great outstanding features of the Lucky Strike cigarette is the "Toasting 644
Process." That was originated by the late defendant Penn. The "Toasting Process" results in the elimination of greater quantities of nicotine, acetic acid, ammonia, ethyl acetate, formic acid, furfural, isovaleric acid, and waxy substances as compared with the quantities removed by earlier methods. Those chemical constituents in a large measure make up the "bite" in tobacco. The "Toasting Process" in the main consists of subjecting the tobacco to heat without destroying the quality of the tobacco. By the use of the "Toasting Process" a sweeter and more mellow tobacco with less harsh irritants is produced. In order to apply that high temperature without injuring the quality of the tobacco, special machines were invented under the guidance of the late defendant Penn. No other 645
tobacco company has been successful in applying heat to tobacco in that manner. Machines have been developed under the guidance of the late defendant Penn to distribute the proper amount of tobacco on the cigarette paper so that the cigarette should have the proper weight in accordance with a predetermined formula; machines have been developed that automatically count the cigarettes in lots of twenty, wrap them with paper-backed foil,

over which is applied the outside label, and affix United States revenue stamps on the individual packages, sealing the same; machines have been developed which wrap and seal the package with cellophane.

At the Richmond factory very many different brands of smoking tobacco are manufactured and tobaccos from various parts of the world are in use there. More than 4800 different kinds and sizes of wrapping material are used. The supervision and management of that branch requires a thorough knowledge of and familiarity with all tobaccos, blends and flavors.

In 1929 the date defendant Penn was made Vice-Presi-
647 dent of the American Cigar Company, in charge of its entire production, at which time its production was small. The cigars were manufactured by hand in various factories scattered throughout the country. In a period of less than ten months the manufacture of cigars was entirely revolutionized into the making of cigars by machines and the concentration of large factory units. Following the policy of concentrating that had been adopted with cigarettes, the Company decided to concentrate upon one cigar and the brand taken for development was the Cremo cigar. When the late defendant Penn took charge of the production, the output was approximately 90,000 cigars a day. Under his guidance and at the time of his death the approximate daily output was 2,000,000 cigars.

The services that the late defendant Penn and defendant
648 Neiley rendered were extraordinarily valuable to the Company, reduced the cost of manufacturing, enabling thereby the stockholders to have a larger return. The services rendered by the late defendant Penn were far more valuable to the Company during the period for which they were rendered than any compensation paid to him, including any benefits which may be received by his representatives under the Employees' Stock Subscription Plan.

At no time has the compensation received by the defendant Neiley been greater than the fair and reasonable value of the services rendered by him for the period for which such compensation was paid, and the compensation now being received by said defendant, including the benefits under the Employees' Stock Subscription Plan, is not greater than the fair and reasonable compensation for the services now being rendered by him.

(c) The defendant Mower, who resigned from the Company on July 31, 1931, was in charge of the English branch of the Company's business. The English branch has been and is engaged in the manufacturing of a brand of cigarette called Kensitas, which is a different type and kind 650
of cigarette than the Lucky Strike, due to the fact that the English taste is not for a blended cigarette but a Virginia cigarette. Defendant Hill and Mower had been associated for many years with the result that they were thoroughly imbued with one another's methods and ideas. Defendant Mower was selected by defendant Hill as the man to exploit the Company's business in England and it was because of said defendant Mower that defendant Hill approved the extension of the business to England—an extension which, already successful, offers vast possibilities to the Company and to the stockholders of the future and is today one of the Company's valuable assets. Defendant Mower had been in charge, under defendant Hill's direction, of the English branch since 1928, at which time 651
the volume of its business was comparatively small. Under those defendants' management, it has developed to the point where it now has the second largest volume of sales of shilling cigarettes in Great Britain. That defendant increased the sales of cigarettes by a vigorous advertising campaign, improved concentration of methods of manufacturing and production, improvements in the selling organization and bringing to England American methods of doing business. Prior to the assumption of the leader-

ship of the English branch, defendant Mower had been the Vice-President of the Company coordinating in advertising and sales. The devotion of that defendant to the Company had been such that, despite the advice of his physicians and at great peril to his health, he continued with the Company until his physical condition became such that he was compelled by his medical advisers to retire from all business activities. The services rendered by defendant Mower were far more valuable to the Company than any compensation paid to him, during the period for which they were rendered, including any benefits which will be received by him under the Employees'
653 Stock Subscription Plan.

(d) Defendant Riggio was and is the Vice-President in charge of sales and advertising, responsible for the organization and function of the sales department. The sales department is divided into five sections, each section being responsible for a certain territory in the United States. Each section is in charge of a section manager, who in turn has field managers, division managers and retail salesmen. The responsibility for the function and activities of all the men in those departments is a part of the duties imposed upon defendant Riggio. Among other departments for which the defendant is responsible are the following: the advertising department dealing with displays and posters, the navy department, Turkish
654 cigarette department, the high grade tobacco department, private brands, the export department, and the Lucky Strike radio hour.

In planning the Lucky Strike radio hour, defendant Riggio coordinates with defendant Hill. The Lucky Strike radio hour is of great importance to the Company. It is a form of advertising that reaches millions of people from coast to coast. The Lucky Strike radio hour is on the air on Tuesdays, Thursdays and Saturdays of each week by means of a national broadcasting system. The purpose

of the Lucky Strike radio hour is to accelerate the sales of the Lucky Strike cigarettes, which is the brand of cigarette upon which the Company concentrates in this advertising. The success of the selling program is dependent to a great extent upon the success with which the Lucky Strike hour is received by the radio public. The planning of this hour involves a great deal of care and attention, as the hour is comprised of a musical performance combined with an advertising program. One must lead into the other so as to hold the greatest interest for the public and at the same time increase the public's desire to purchase the Lucky Strike cigarette. If this hour is not well planned, it would mean a loss of money to the Company 656
by reason of the expense that it entails. Furthermore, the radio hour must fit into and supplement the other advertising media used by the Company.

Defendant Riggio was and is in charge of the sales and advertising of American Cigar Company, a subsidiary of the Company, which Cigar Company has increased its sales from 90,000 cigars a day in 1929 to more than 2,000,000 a day at the present time. Defendant Riggio is responsible for the organization of the sales department and has instituted economies that have resulted in savings of large sums of money for the Company each year.

Illustrating the value of the services rendered by that defendant is the increase in the proportion of Lucky Strike cigarettes sold, with the slight increase in the cost 657
of sales, to-wit:

	Increase in Quantity of Sales	Percentage of Cigarettes Sold	Cost of Sales
1929.....	36,992,668,284	34.16	$4,242,814.46
1930.....	43,212,434,694	38.10	4,901,119.16

Defendant Riggio is one of the outstanding men in the tobacco industry to-day. He is one of the great sales

executives of the United States. His services have been of a unique and peculiar value that cannot readily be replaced. He has a thorough knowledge of the tobacco industry and the psychology of the buying public. He has the unique ability of organizing sales campaigns that have been without parallel in the history of the tobacco industry. He has maintained a morale in the sales organization of the Company that results in his subordinates functioning at the highest degree of efficiency. At no time has the compensation received by the defendant Riggio been greater than the fair and reasonable value of the services rendered by him for the period for which such
659 compensation was paid, and the compensation now being received by said defendant, including the benefits under the Employees' Stock Subscription Plan, is not greater than the fair and reasonable compensation for the services now being rendered by him.

(e) Defendant Taylor is Vice-President, a Director, and Auditor of the Company. He is responsible for and supervises the auditing of:

I. The New York office departments.
II. Subsidiary and affiliated companies.
III. American Cigar Company.
IV. American Tobacco Company of the Orient.
V. American Suppliers, Inc.
660 VI. The branches.
VII. General accounting matters.

1. The New York office departments are fifteen in number, as follows:

1. Credit and collections.
2. Subsidiary—auditing—statistical and taxes.
3. Salesmen and advertising depot.
4. Insurance.

5. Service.
6. Mailing.
7. Stenographic.
8. Medical.
9. Export and Import.
10. Traffic.
11. Advertising.
12. Deal.
13. Order.
14. Filing and town figures.
15. House sheet and depot billing.

II. The subsidiary and affiliated companies comprise the following: 662

1. The American Tobacco Company of the Pacific Coast.
2. American Cigar Company.
3. Golden Belt Manufacturing Company.
4. The Tin Decorating Company of Baltimore.
5. De Mauduit Paper Corporation of New York.
6. Societe Anonyme des Papeteries de Mauduit.
7. J. Wix & Sons, Limited.

III. The American Cigar Company embraces:

1. The leaf department offices.
2. Handling plants.
3. Stemmeries. 663
4. Porto Rican Leaf Tobacco Company.

IV. The American Tobacco Company of the Orient has offices as follows:

Athens	(2)
Cavalla	(2)
Xanthi	(2)
Drama	(2)

Serres
Salonica (2)
Volo (2)
Patras
Piraeus (2)
Mitylene
Samos (2)
(all in Greece)
Smyrna (2)
Samsoun (2)
Baffra
(all in Turkey)

665 Trieste, Italy (2)

V. The American Suppliers, Inc., is divided into two territories:

1. The Western divisions.
2. The Southern divisions.

The Western divisions are located at:

Louisville, Kentucky,
Maysville, Kentucky.
Owensboro, Kentucky.
Lexington, Kentucky.

The Southern Divisions are located at:

666

Durham, North Carolina.
Reidsville, North Carolina.
Richmond, Virginia.

VI. The branches are at the following places:

Durham, North Carolina.
Louisville, Kentucky.
Reidsville, North Carolina.
Richmond, Virginia.

Virginia, Virginia.
Nashville, Tennessee.
St. Louis Depot, Missouri.
The A. T. Company of the Pacific Coast.

VII. The general accounting matters comprise four subdivisions, viz.:

1. General Accounting.
2. Cashier's Department.
3. Dividend Department.
4. Newspaper, magazine, etc., advertising, accounting.

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Defendant Taylor has effectuated savings of large sums of money through economy of operations and close and detailed application to and supervision of the auditing problems; and because of his thorough knowledge of the activities of the Company and his extraordinary value to it and the many duties that have been and are imposed upon him, at no time has the compensation received by the defendant Taylor been greater than the fair and reasonable value of the services rendered by him for the period for which such compensation was paid, and the compensation now being received by said defendant, including the benefits under the Employees' Stock Subscription Plan, is not greater than the fair and reasonable compensation for the services now being rendered by him.

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(f) Defendant Harvie is Treasurer and a Director of the Company. As Treasurer he has charge of and supervises the finances concerning:

I. Collections, Depositaries, and Disbursements.
II. Stockholders.
III. Securities.

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IV. Leaf Purchasing,
Foreign
Domestic.
V. Manufacture.
VI. Subsidiaries.

As Treasurer, he has the responsibility for the selection of proper depositaries for the principal funds of the Company and for the distribution of such funds among the depositaries so as to provide maximum safety. He is also responsible for and has charge of the selection of proper depositaries for the Company's various branches
671 and subsidiaries, which include, among others:

American Cigar Company.
American Suppliers, Inc.
American Tobacco Company of the Orient.
Societe Anonyme des Papeteries de Mauduit.
Cuban subsidiaries.

As Treasurer of the Company, defendant Harvie has charge of the Company's safe deposit boxes and all of its securities. His duties in connection with the securities include the purchase, sale, and care thereof, and he is responsible for the records, exchanges, costs, and values of owned securities; the preparation of the annual report to stockholders, of which there are some 40,000, and con-
672 tact with the Transfer Agent and Registrar of the stock of the Company; in connection with the stockholders, he has charge of stock records and the payment of dividends on the preferred and common stock; and the correspondence with the Company's stockholders.

Defendant Harvie supervises the collections and disbursements at the following foreign branches and sub-branches:

1.	Cavalla	(2 Banks)
2.	Drama	(2 ")
3.	Serres	(2 ")
4.	Xanthi	(2 ")
5.	Smyrna	(4 ")
6.	Trieste	(2 ")
7.	Piraeus	(The American Express Co.)
8.	Samos	(2 Banks)
9.	Mitylene	(2 ")
10.	Candia	(2 ") 674
11.	Canea	(2 ")
12.	Rethymnon	(2 ")
13.	Cos	(2 ")
14.	Volo	(2 ")
15.	Salonica	(2 ")
16.	Ekaterini	(1 Bank)
17.	Agrinion	(2 Banks)
18.	Astakos	(1 Bank)
19.	Athens	(The American Express Co.)
20.	Samsoun	(2 Banks)
21.	Patras	(2 ")

as well as the following domestic branches:

1.	Durham	(3 Banks) 675
2.	Danville	(1 Bank)
3.	Greenville	(1 ")
4.	Kinston	(1 ")
5.	Oxford	(1 ")
6.	Rocky Mountain	(1 ")
7.	South Boston	(1 ")
8.	Valdosta	(1 ")
9.	Maysville	(2 Banks)

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10. Owensboro (3 ")
11. Reidsville (1 Bank)
12. Richmond (1 ")
13. Louisville (2 Banks)
14. Lexington (2 ")
15. Greeneville (2 ")

He supervises the finances of the following subsidiaries:

A. American Cigar Co.
B. Cuban Tobacco Co.
C. Havanna Com'l Co.
D. H. De Cabanas.
677 E. H. Clay & Bock.
F. Cuban Land & Leaf Tobacco Co.
G. Havana Cigar & Tobacco Factories.
H. Porto Rican Tobacco Co.
I. Cliff Weil Cigar Co.
J. S. A. Papeteries De Mauduit.
K. Golden Belt Manufacturing Co.
L. De Mauduit Paper Co.
M. Tin Decorating Co. of Baltimore.
N. J. Wix & Sons, Ltd.

At no time has the compensation received by the defendant Harvie been greater than the fair and reasonable value of the services rendered by him for the period for which
678 such compensation was paid, and the compensation now being received by said defendant, including the benefits under the Employees' Stock Subscription Plan, is not greater than the fair and reasonable compensation for the services now being rendered by him.

(g) Defendant Boylan is Secretary and a Director of the Company and Director of Purchases. His duties are threefold:

1. Secretarial.
2. Purchasing of supplies for the Company.
3. Purchasing of supplies for the American Cigar Company.

As Secretary, his functions are subdivided into Meetings and Records.

With respect to Meetings, that defendant has supervision of the preparation of resolutions and minutes and holding of stockholders' and directors' meetings of the Company and the following subsidiaries:

1. Golden Belt Manufacturing Co. 680
2. Tin Decorating Company of Baltimore.
3. Nashville Tobacco Works.
4. De Mauduit Paper Corporation of New York.
5. American Tobacco Company of the Orient.
6. J. Wix & Sons, Limited.
7. Societe Anonyme des Papeteries de Mauduit.
8. J. W. Carroll Tobacco Co.
9. American Suppliers, Inc.

With respect to Records, that defendant has the duty to maintain and keep records for the Company and the subsidiaries above mentioned, as follows:

1. Minutes of the stockholders' and directors' meetings.
2. Internal Revenue. 681
3. Customs.
4. Workmen's Compensation.
5. Leases.
6. Agreements.
7. Contracts.
8. Deeds.
9. Legal matters.

10. Patents and trade-marks, domestic and foreign.
11. Advertising.
12. Bonds and stocks.
13. Correspondence.
14. New York Stock Exchange listings.
15. Miscellaneous.
16. Formulae.
17. Proxies.

In connection with the Internal Revenue, Customs and Prohibition Departments of the Federal Government, and
683 the operation of the Company's business, it becomes necessary to prepare, file, and obtain various papers. All such papers, documents, etc., are prepared under the supervision of that defendant. It is his duty to keep in close touch with those departments of the Government as to laws, amendments, and decisions, and to represent the Company at all conferences before those departments when necessary. That defendant must examine all leases, agreements, contracts, and deeds, so that clauses with respect to termination or renewal privileges should be noted. As Director of Purchases, that defendant is in charge of all purchases for the Company and its factories at Durham, North Carolina, Louisville, Kentucky, Reidsville, North Carolina, Richmond, Virginia, and the subsidiary and affiliated companies consisting of American Suppliers,
684 Inc., with branches at:

Durham, N. C.
Lexington, Ky.
Louisville, Ky.
Maysville, Ky.
Owensboro, Ky.
Reidsville, N. C.
Richmond, Va.
South Boston, Va.;

and American Cigar Company, with branches at:

Camden, N. J.
Charleston, S. C.
Dayton, O.
Hartford, Conn.
Kansas City, Mo.
Lancaster, Pa.
Norfolk, Va.
Passaic, N. J.
Petersburg, Va.
Philadelphia, Pa.
Sparta, Wis.
Louisville, Ky. 686
Trenton, N. J.
Xenia, O.

Also the:

Golden Belt Man'f'g Co.
Henry Clay & Bock & Co.
Nashville Tobacco Works.
Porto Rican Leaf Tobacco Co.
Tin Decorating Co. of Baltimore.
J. Wix & Son, Ltd.
Societe Anonyme des Papeteries de Mauduit.

Defendant Boylan has the duty so to divide the work of the Purchasing Department that no part of manufacturing at any plant shall be delayed and that all purchases 687
and records shall be handled in the most efficient manner, so that the costs of the Purchasing Department shall be at all times kept at the lowest possible figure. The work of the Purchasing Department is divided into three general classes of materials and supplies as follows:

First class:

1. Bags (Cloth and Paper)
2. Billboard Posters
3. Cartons
4. Carton Bands
5. Cigarette Boxes
6. Cigarette Labels
7. Miscellaneous Advertising Items
8. Muslin Signs
9. Novelties
10. Plug Boxes
11. Printed Advertising Material

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12. Printed Stationery
13. Shelves and Slides
14. Shipping Containers
15. Tags (Tin and Paper)
16. Tins
17. Tobacco Labels
18. Window Displays
19. Window Posters
20. Wood cases

Second class:

1. Brooms and Brushes
2. Cafeteria Equipment
3. Cleansers

690

4. Dies
5. Electric Motors
6. Electrical Supplies
7. Factory Maintenance Repairs
8. Hospital Supplies and Equipment
9. Incidentals
10. Lubricating Oils and Greases
11. Machinery
12. Machine Knives

13. Machine Parts
14. Machine Job and Mill Supplies
15. Metals
16. Office and Factory Furniture and Fixtures
17. Pipe and Pipe Fittings
18. Ribbons
19. Stationery

Third class:

1. Adhesives
2. Automobiles
3. Auto Accessories
4. Bronze Powder
5. Carton Stock 692
6. Cellophane
7. Cellophane Chemicals
8. Cigarette Paper
9. Coal
10. Essential Oils and Flavorings
11. Gum Spices
12. Lamps
13. Leather and Cotton Belting
14. Paper
15. Printing Inks
16. Starch
17. Tin Foil
18. Twine and Cord

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The average yearly purchase of supplies is between $65,000,000 and $70,000,000. An example of the amount of supplies so purchased during the year is the following:

18,000,000 Pounds of Tin Foil
3,000,000,000 Labels
600,000,000 Cigar Bands
20,000,000 Pounds of Carton Stock

10,000,000	Pounds of Containers
175,000,000	Muslin Bags
17,000,000	Cigar Boxes
50,000,000	Tobacco Cans
3,500,000	Pounds of Cellophane
200,000	Muslin Signs
500,000	Window Displays
400,000	Pounds of Tonca Beans
5,000,000	Pounds of Paper
$2,500,000	Worth of Machinery
$ 200,000	Worth of Automobiles

695 Every requisition for supplies is carefully examined, and defendant Boylan is responsible to see that the quantity ordered does not exceed the limit of the Company's requirements. Through constant study and research, that defendant has eliminated waste by the limitation of purchases of materials, so that there would be no accumulation through constant changing of factory and sales conditions of obsolete materials. In connection with the purchase of materials, that defendant conferred with the late defendant Penn or defendant Neiley and defendant Riggio as to the most economical course to pursue. As a part of his duties, that defendant is required at all times to keep himself fully informed, through trade papers, magazines, and various reports, as to the market conditions and trend of prices on all materials purchased for the
696 Company.

At no time has the compensation received by the defendant Boylan been greater than the fair and reasonable value of the services rendered by him for the period for which such compensation was paid, and the compensation now being received by said defendant, including the benefits under the Employees' Stock Subscription Plan, is not greater than the fair and reasonable compensation for the services now being rendered by him.

L. The Employees' Stock Subscription Plan was duly authorized by the stockholders of the Company at a duly constituted meeting after due notice given to all of the stockholders of the Company, and said Plan was duly authorized and is legal and valid both by virtue of Section 158, et seq. of the General Corporation Act of New Jersey and the laws of the State of New Jersey other than said Act.

The adoption of the Plan by the Company was authorized by §158 of the General Corporation Act of New Jersey (Laws of 1920) and was adopted by its Directors with the approval of the stockholders in strict compliance with the provisions of said Section; that the allotment of the 56,712 shares was in strict compliance with the provisions of said Plan authorized and adopted as aforesaid, and that the shares allotted, together with all other compensation from whatever source received, did not in the aggregate constitute more than reasonable and fair compensation for the services rendered by those employes, respectively. 698

Under the laws of New Jersey, irrespective of §158 of the General Corporation Act of New Jersey (Laws of 1920), the Directors had authority to appoint such officers and agents as the business of the Company might require and to allow them suitable compensation, and by the Charter and By-Laws of the Company the administration of the affairs of the Company was vested in the Directors, and by authority thereof said Directors had power to fix the compensation of all officers and employes of the Company; that pursuant to said laws, Charter, and By-Laws the Directors had the authority to make the allotment of shares as provided in said Plan, and that the shares allotted, together with all other compensation from whatever source received, did not in the aggregate constitute more than reasonable and fair compensation for the services rendered by those employes, respectively. 699

LI. The record of the Company under the management of the defendants is one of the most remarkable in the history of corporations in this country. In fact, there is no other corporation in the United States which has shown such a record of continuing improvement and prosperity, and that despite the worst depression in the country's history. The 535 participants in the Employees' Stock Subscription Plan were deemed by the Board of Directors to be the best men in the Company and those responsible for the continuous success that it has attained. That determination is justified by the record of the Company for the year 1931. Despite the fact that many other corpora-
701 tions have sustained marked diminution in profits, this Company will show, for so much of the year 1931 that has now elapsed, a larger volume of business and a larger profit than it had for the corresponding period of 1930.

LII. The job of manufacturing and vending over one hundred and fifty million articles daily is an almost superhuman task. In itself it constitutes a gigantic service by this Company to the public. First the acquisition and selection of the raw materials of the highest quality and yet adaptable to economic needs of the industry, the handling and preparation of those materials so as to be ready for each day's supply, the maintenance of uniform standards of grade, quality and taste so as to satisfy a highly discriminating public, form the primary basis of
702 the business. Unless this is maintained at the highest possible standard and uniformly maintained, no ingenuity can induce the consumer to give his patronage.

Then the exact details of the blended mixture, the hygienic treatment, and the interminable organization of human effort involved in the physical process of manufacturing, gathering, wrapping, packing and delivering daily over one hundred and fifty million articles is a problem which would have been impossible at any time

during the history of civilization up to the last twenty years. It requires eternal vigilance for the latest development in the art, the utilization of every cost-saving device, and ceaseless ingenuity in search of constant improvement. When it is realized that from this vast daily turnover the corporation makes but a fraction of a cent per article and the Government by its excise tax alone charges one-third of a cent, some idea of the tremendous consequence of every hundredth of a cent in cost per article may be gleaned.

But quite aside from this tremendous manufacturing achievement there is a still greater problem involved in the sales. In no industry in the world is competition keener or more ruthless than in the cigarette business. 704
The competitors are powerful, ingenious and alert to every possible advantage, spending millions of dollars in publicity both in defensive and offensive tactics, and no manufacturer can hope even to hold his own with them unless he can develop a product in fact superior to theirs as to quality and as to certain innate characteristics unsusceptible of imitation. After all, a cigarette is but a small roll of tobacco cased in paper. The gamut of attributes of such an article is essentially limited. But first the quality bears infinite study and is capable of great skill in selection; then the nature of the blend permits the greatest ingenuity; and thereafter the process involves secret treatment so as to eliminate harmful constituents and to improve the desirable ones. Therein lies 705
opportunity for continuous scientific laboratory tests and analyses, all to the end that the ultimate smoking of the cigarette shall produce the greatest delectable sensation with the least deleterious effect upon the smoker. Then of course the style and fashion of the package are most important. It must appeal to the eye; it must be easy of handling; it must preserve exactly the proper condition of the article contained; and yet it must economically

fall within the narrow margin of cost of which so cheap an article permits.

Having carefully and unremittingly attended to all these problems and having built up a vast organization thoroughly attuned to the daily needs, it still becomes essential for the management to find a new and interesting theme by which to keep the product always in the public mind without arousing the antagonism of offensive repetition; and this need is never completely discharged. The greater the growth of the business the more accentuated becomes the need.

707 LIII. As remarkable as the growth of the business, is the increase, in the number of Lucky Strike cigarettes sold in 1930 as compared with the increase of cigarettes sold in the United States. In that year, the total increase in cigarettes, according to the Revenue figures of the Federal Government, was approximately five hundred million, whereas the increase in Lucky Strike cigarettes was nearly six thousand million; in other words, the Company took approximately five thousand five hundred million cigarettes from its competitors. For the first ten months of 1931 the Company has continued to gain in the sale of its Lucky Strike cigarettes at the expense of its competitors in practically the same ratio as it had for the year 1930, in that the sale of other cigarettes has decreased by four thousand four hundred seventy-nine million cigarettes, the Lucky Strike sales have increased by two thousand three hundred ninety-five million cigarettes.

708

When it is realized that in a year of depression such as 1930 this management showed a net profit of over forty-three million dollars and paid the United States Government over one hundred and fifty millions, some idea can be gained as to the efficiency with which this task has been done. Of course, such a work requires an army of people. It demands the highest skill in each department and the number of departments is numerous.

But above all this army of highly efficient workers there is one chief executive—who must be alive to every section of every department of the business. The chief executive must surround himself with adjutant executives so as to carry out his policies and to keep him alive to every development. Such has been the function of George W. Hill and such are the functions of the Board of Directors. Moreover, the quality of this work is best attested by the fact that in these days of depression this great Company is almost unique among the industries of the world in showing a substantial advance in profits over the best year it has ever had in its history.

LIV. The various forms of compensation (in addition 710
to a fixed salary) paid to the executives and key men of the Company by means of a participation in the profits or by an allotment of shares of its stock are a principle of administration of the Company conceived by one of the greatest industrial leaders of all times, the late James B. Duke, and recognized by his successors in office. That principle is, in order to obtain the greatest efforts, services, loyalty, efficiency and results, a compensation other than a fixed compensation must be held out to the men who are in positions of responsibility; compensation of such a nature as to make those men feel and realize that they are part owners of the business and that their personal success and prosperity are measured by the success and prosperity they achieve for the Company and its 711
stockholders. The fruition of that principle is established and justified in its application in the continuous increasing success of the Company, and its maintenance is essential to its future prosperous life.

LV. The Company was not in need of funds so as to compel it to allot the stock under the Plan to its employes at a price above its par value. It did not desire to make

money at the expense of those employes who were responsible for the large sums that had been paid in the past and are being paid at present to its stockholders. If it be assumed that the differential between the par value of the stock and its market value at the time that said stock was allotted, that is, the difference between $25 and $112 a share, was an expense to the Company, that expense for the 535 employes amounted approximately to $1 a share for each share of the outstanding stock of the Company, whereas the stockholders, for the first quarter of 1931, received $2.25 a share upon each share of stock outstanding. The regular dividend of $1.25 has been
713 maintained in each quarter of 1931, which in itself is a justification of the action of the stockholders in authorizing the Employees' Stock Subscription Plan. The defendants are men of extraordinary vision and ability and have fully and faithfully performed all services in such an effective manner that the results have far exceeded the highest expectations of the great majority of the stockholders of the Company.

LVI. Plaintiff at the annual stockholders' meeting, in attempting to prevent the defendant Hill from being re-elected as a director of the Company, was imperiling and prejudicing the investment of some 40,000 stockholders, by nominating, in place and instead of defendant Hill,—who is the one who has been so largely responsible for the
714 phenomenal success of the Company and has surrounded himself with associates who are of extraordinary capacity and ability and who himself knows every branch of the tobacco industry from the purchasing of the leaf to the ultimate disposition of the finished product,—a man who had no experience whatsoever in the tobacco business, a man who knew nothing about the leaf buying, who knew nothing about the blending of cigarettes, who knew nothing about advertising, who had been associated for twenty

years with a company whose business is wholly foreign to the tobacco business and of whom plaintiff stated at the meeting after nominating him that he did not know him, of him or about his qualifications.

WHEREFORE defendants demand judgment that the complaint be dismissed with costs.

CHADBOURNE, STANCHFIELD & LEVY,
Attorneys for Defendants, George W. Hill,
Vincent Riggio, J. B. Harvie, R. J. Boylan
and The American Tobacco Company,
Office & P. O. Address,
No. 25 Broadway, 716
Borough of Manhattan,
New York City.

WILLIAM M. PARKE,
Attorney for Defendant T. R. Taylor,
Office & P. O. Address,
No. 25 Broadway,
Borough of Manhattan,
New York City.

VICTOR J. DOWLING,
LOUIS S. LEVY,
GEORGE W. WHITESIDE,
J. ARTHUR LEVE,
Counsel.

717

UNITED STATES OF AMERICA,
SOUTHERN DISTRICT OF NEW YORK, } ss.:
STATE AND COUNTY OF NEW YORK,

RICHARD J. BOYLAN, being first duly sworn, deposes and says that he is the Secretary of The American Tobacco Company, one of the defendants herein; that he has read the foregoing answer and knows the contents thereof; that he is duly authorized to make oath to the same; that the same is true of his own knowledge except as to the matters therein stated to be alleged on information and belief and that as to those matters he believes them to be
719 true.

The reason why this verification is not made by the defendant personally is that the defendant is a corporation. The sources of deponent's knowledge and the grounds of his belief as to all the matters therein not stated to be on knowledge are statements and reports received from the officers and agents of defendant corporation having in charge the matters referred to in said answer.

RICHARD J. BOYLAN.

Sworn to before me this
27th day of November, 1931.

HERBERT PETERSON,
720 Notary Public,
Queens County.
Clerk's No. 1450, Reg. No. 7379.
N. Y. Co. Clk's No. 399, Reg. No. 3 P 275.
Commission expires March 30, 1933.

[NOTARIAL SEAL]

UNITED STATES OF AMERICA,
SOUTHERN DISTRICT OF NEW YORK, } ss.:
STATE AND COUNTY OF NEW YORK,

RICHARD J. BOYLAN, being first duly sworn, deposes and says that he is one of the defendants herein; that he has read the foregoing answer and knows the contents thereof; that the same is true of his own knowledge, except as to the matters therein stated to be alleged on information and belief and that as to those matters he believes it to be true.

RICHARD J. BOYLAN.

Sworn to before me this
27th day of November, 1931. 722

HERBERT PETERSON,
Notary Public,
Queens County.
Clerk's No. 1450, Reg. No. 7379.
N. Y. Co. Clk's No. 399, Reg. No. 3 P 275.
Commission expires March 30, 1933.

[NOTARIAL SEAL]

723

724 **Amended Answer of Defendants Guaranty Trust Company of New York and Junius Parker to Amended Complaint.**

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

[TITLES OF BOTH ACTIONS.]

The defendants Guaranty Trust Company of New York and Junius Parker, for their amended answer to the amended complaint herein, allege:

FIRST: Deny, upon information and belief, so much of
725 the subdivision numbered "5" of the amended complaint herein as alleges that the program therein referred to paved the way for, or authorized, the distribution of any of the stock in question to anyone who was not an employee of The American Tobacco Company or one of its subsidiaries or that the said program paved the way for the distribution of stock of The American Tobacco Company to anyone at a nominal price wholly disproportionate to its market value.

SECOND: Deny, upon information and belief, so much of the subdivision numbered "6" of the amended complaint herein as alleges that the program therein referred to contemplated the setting aside of stock of The American Tobacco Company for distribution to the directors, officers
726 and certain employees of such Company as set forth in the amended complaint, but allege, upon information and belief, that said shares were to be available as provided by the said employees' stock subscription plan set forth in Exhibit C to such amended complaint.

THIRD: Deny, upon information and belief, so much of the subdivision numbered "7" of the amended complaint herein as alleges that as a condition precedent to sub-

mitting to the stockholders for approval any plan for an issue, or the sale and purchase, of capital stock of The American Tobacco Company to any of its employees, the Board of Directors of such Company were required to first formulate such plan and pass a resolution declaring that in the opinion of the Board the adoption thereof was advisable; that the resolution of the Board of Directors of The American Tobacco Company, therein referred to, passed on or about June 25, 1930, was not adopted by a majority of a quorum legally qualified to vote thereon; that there was not present at such meeting a quorum of directors legally qualified to vote upon said resolution; that such resolution was not legally adopted by a ma- 728
jority of a quorum of disinterested directors, and was invalid, void and of no effect; that the subsequent vote of stockholders was void and of no effect; that the issue of stock thereunder for any purpose or at any price was invalid and void, but on the contrary allege, upon information and belief, that such resolution was duly passed; that the subsequent vote of stockholders was regular and valid and that the issue of stock thereunder was valid and proper.

FOURTH: Deny, upon information and belief, so much of the subdivision numbered "8" of the amended complaint herein as alleges that the resolution of the Board of Directors of The American Tobacco Company therein referred to was invalid. 729

FIFTH: Deny, upon information and belief, so much of the subdivision numbered "11" of the amended complaint herein as alleges that 312,968 shares of the Common Stock B of The American Tobacco Company has been set aside or distributed to the directors, officers and employees of such Company, but allege, upon information and belief, that only 56,712 shares of such stock have been set aside

for subscription and that this was pursuant to resolution of the Board of Directors and for subscription in accordance with the Employees' Subscription Plan (Exhibit B annexed to the amended complaint).

SIXTH: Deny, upon information and belief, so much of the subdivision numbered "12" of the amended complaint herein as alleges that all of the directors of The American Tobacco Company were among those employees of the Company to whom it was voted to allot for subscription stock of the Company by the Board of Directors thereof on January 28, 1931, or so officially announced, or that
731 the directors of said meeting voted to sell said 56,712 shares of stock to employees of such company, or so officially announced, but allege, upon information and belief, that they voted only to offer the same in accordance with said Stock Subscription Plan (Exhibit B annexed to the amended complaint).

SEVENTH: Deny, upon information and belief, so much of the subdivision numbered "15" of the amended complaint herein as alleges that the program therein referred to never in fact received the approval of the stockholders of The American Tobacco Company at the meeting held July 28, 1930; that said program did not authorize or approve a sale of the said stock at less than its actual or market value; that defendant George W. Hill so construed
732 it; that the sale of the stock in question as provided for was and is a waste of the corporate assets and an unlawful infringement upon the rights of the stockholders of the Company and allege, upon information and belief, that the program in question was duly approved by the stockholders, and that the allotment of the stock pursuant thereto was valid and proper.

EIGHTH: Deny, upon information and belief, so much of the subdivision numbered "16" of the amended com-

plaint herein as alleges that the Plan, Exhibit "B" attached to the amended complaint, was or is illegal, *ultra vires* or void, or that stock of the Company could not be lawfully issued for services to be rendered as therein provided.

NINTH: Deny, upon information and belief, so much of the subdivision numbered "17" of the amended complaint herein as alleges that the allotment of stock to directors and other employees, pursuant to the program therein referred to, was in violation of any right of the plaintiff or any other stockholder of the Company as expressed by the charter of the Company or the laws of the State of New Jersey, or otherwise; that such allotment of 734
said stock to employees was in violation of the pre-emptive right of any stockholder of said Company, and that such sale is illegal, void and an unlawful infringement upon the rights of any stockholder.

TENTH: Deny, upon information and belief, so much of the subdivision numbered "18" of the amended complaint herein as alleges that the President of The American Tobacco Company selected himself as one of those entitled to subscribe to the stock in question or that the Plan, Exhibit "B" attached to the amended complaint herein, was or is illegal, *ultra vires* and void for the reasons specified in the said subdivision numbered "18" of the amended complaint herein, or any of them, or for any 735
other reason.

ELEVENTH: Deny, upon information and belief, so much of the subdivision numbered "19" of the amended complaint herein as alleges that all of the directors of The American Tobacco Company were among those employees to whom stock was allotted under the Plan therein referred to; that the arrangement with this defendant Guar-

anty Trust Company of New York, set forth in Exhibit "G" annexed to the amended complaint, was a sale to and purchase by the Guaranty Trust Company of New York or is contrary to said Plan; that the declarations therein referred to contained in the various resolutions passed by the Board of Directors of The American Tobacco Company, or in the agreement therein described, were or are a mere pretext and attempted cover for an illegal act and themselves a badge of fraud upon the part of the directors approving the same; and further deny, upon information and belief, the allegations that the said allotment of the stock of The American Tobacco Company to employees was or
737 is abortive, illegal or void for the "additional reasons" specified in the subdivision numbered "19" of the amended complaint herein, or any of them, or for any other reason, and the allegations contained in such "additional reasons" numbered "First," "Second," "Fourth," "Fifth" and "Sixth" and so much of the "additional reasons" numbered "Third" as alleges that Junius Parker, Louis Levy or Ivy Lee are not employees of the company.

TWELFTH: Deny, upon information and belief, so much of the subdivision numbered "20" of the amended complaint herein as alleges that there was any fraud in connection with the adoption of the Plan referred to in the amended complaint or the allotment of the stock of The American Tobacco Company to its employees, or that any
738 of the matters set forth in said paragraph show any fraud; that any of the shares of stock have been distributed to the defendants Hill, Penn (now deceased), Mower (who resigned on July 31, 1931), Neiley, Riggio, Harvie, Boylan, Fletcher (who resigned on June 13, 1931), Taylor and Parker, or to any other officer or director of the Company or to any other employee of the Company.

THIRTEENTH: Deny, upon information and belief, so much of the subdivision numbered "21" of the amended

complaint herein as alleges that there was any indirection, deceit or suppression of the truth upon the part of the Directors of The American Tobacco Company, or any of them, in connection with the adoption of the Stock Subscription Plan in question or the allotment of the stock pursuant to the Plan.

WHEREFORE, defendants Guaranty Trust Company of New York and Junius Parker respectfully pray that the amended complaint herein be dismissed with costs and disbursements and for such other relief as may be just.

DAVIS, POLK, WARDWELL, GARDINER & REED,
Attorneys for Defendants Guaranty Trust 740
Company of New York and Junius
Parker,
Office and P. O. Address,
15 Broad Street,
Borough of Manhattan,
City of New York.

741

UNITED STATES OF AMERICA,
SOUTHERN DISTRICT OF NEW YORK, } ss.:
STATE AND COUNTY OF NEW YORK,

MERREL P. CALLAWAY, being first duly sworn, deposes and says that he is a Vice-President of Guaranty Trust Company of New York, one of the defendants herein; that he has read the foregoing Amended Answer and knows the contents thereof; that he is duly authorized to make oath to the same; that the same is true of his own knowledge except as to the matters therein stated to be alleged on information and belief and that as to those matters he
743 believes them to be true.

The reason why this verification is not made by the defendant personally is that the defendant is a corporation. The sources of deponent's knowledge and the grounds of his belief as to all the matters therein not stated to be on knowledge are statements and reports received from the officers and agents of defendant corporation having in charge the matters referred to in said Amended Answer.

MERREL P. CALLAWAY.

Sworn to before me this
1st day of December, 1931.

JOHN C. HAMMOND,
744 Notary Public,
New York County.
New York County Clerk's No. 402, Register's No. 2-H-529.
Commission Expires March 30, 1932.

Bill of Particulars.

745

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

[TITLES OF BOTH ACTIONS.]

Pursuant to order of Court entered herein November 7, 1931, plaintiff herewith furnishes further and better particulars of all matters covered by said order, except those as to which the further and better particulars have already been furnished by an amended complaint, as appears by stipulation of the parties hereto entered herein November 7, 1931.

746 1. With reference to the resolutions voted for by the stockholders at the meeting of July 28, 1930, referred to in paragraph 11 of the complaint and covered by paragraph 5 (a) of the order, plaintiff annexes hereto a copy of said resolutions as "Exhibit A" and "Exhibit A-1" and makes the same a part hereof.

2. With reference to the number of stockholders of all classes of stock who voted in favor of said resolutions, and the number of stockholders of all classes of stock who voted against said resolutions, referred to in paragraph 11 of the complaint and covered by paragraph 5 (b) of the order, plaintiff states that the votes so referred to were as follows:

747 In favor of the resolution for the alteration and change of the capital stock, 389,553 preferred shares and 620,024 common shares; and against said resolution, 20 preferred shares and 150 common shares.

In favor of the resolutions approving and adopting the Employees' Stock Subscription Plan, 389,553 preferred shares, 620,086 common shares and 1,218,849 common B shares; and against said resolutions, 10 preferred shares, 170 common shares and 1,995 common B shares.

3. With reference to the question whether plaintiff has accepted the 2 shares of the new common stock of the par value of $25 each for each share of the $50 par value common stock of defendant The American Tobacco Company that he owned at the time of said meeting, and the question whether he accepted the 2 shares of the new common stock B of the par value of $25 each for each share of the $50 par value common stock B of defendant The American Tobacco Company that he owned at the time of said meeting, both questions being covered by paragraph 5 (c) of the order, plaintiff states that the answer to both questions is yes.

749

4. With reference to the question whether the plaintiff has received and accepted the regular dividend of $1.25 a share on the new $25 par value common stock and common stock B of defendant company, and the extra dividend of $1.00 a share on said stock, which dividends were declared on January 28, 1931, and made payable on March 1, 1931, covered by paragraph 6 (a) of the order, plaintiff states that he has received and accepted the dividends referred to.

5. With reference to the question whether plaintiff received and accepted the extra dividend of $4.00 a share, covered by paragraph 7 (a) of the order, plaintiff states that he has received and accepted said dividend.

750

6. With reference to the specific provisions of the New Jersey laws referred to in subdivision 2 of plaintiff's letter set out in paragraph 13 of the complaint, and covered by paragraph 7 (b) of the order, plaintiff states that such provisions are (1) the common law of the State of New Jersey as set forth in the decisions of its courts, and (2) Section 124 of the General Corporation Act of the State

of New Jersey as added by Chapter 318, Section 16 of the Laws of the State of New Jersey for the year 1926.

7. With reference to the specific provisions of subdivision 1a of the Law of 1920, and the name of the State of which the said law is a part, referred to in subdivision 3 of plaintiff's letter set out in paragraph 13 of the complaint, and covered by paragraph 7 (c) of the order, plaintiff states that the provisions referred to are the provisions of Section 1, subdivision (a) of Chapter 175 of the Laws of New Jersey for the year 1920.

8. With reference to the date of the sale of stock at $25 a share referred to in paragraph 15 of the complaint 752
and covered by paragraph 8 (a) of the order, plaintiff states that the sale of stock by the directors to and for the benefit of themselves and other officers and employees of the defendant The American Tobacco Company referred to in said paragraph of the complaint, related to a sale of 56,712 shares of common stock B as set out in greater detail in paragraphs 19 of the complaint and the amended complaint; that the contract for the sale of said stock was entered into January 30, 1931, between the defendant The American Tobacco Company and the defendants Guaranty Trust Company of New York and Junius Parker; that the stock was subscribed for as set out in the aforesaid paragraphs 19 of the complaint and amended complaint between that date and February 10, 1931; and that 753
the said 56,712 shares of common stock B was actually paid for by check of the defendant Guaranty Trust Company delivered to the defendant The American Tobacco Company February 10, 1931.

9. With reference to the actual value as distinguished from the market value of said stock at the time referred to in paragraph 15 of the complaint, covered by paragraph

8 (b) of the order, plaintiff states that by the expression "actual or market value," he had reference to the actual value of said stock as shown by the market value.

Dated, New York, November 10, 1931.

RICHARD REID ROGERS,
Plaintiff *in sua persona*,
Office & P. O. Address,
74 Trinity Place,
Borough of Manhattan,
City of New York.

755

STATE OF NEW YORK, }
COUNTY OF NEW YORK, } ss.:

RICHARD REID ROGERS, being duly sworn, deposes and says that he is the plaintiff above named; that he has read the foregoing bill of particulars and knows the contents thereof, and that the same is true to his knowledge.

RICHARD REID ROGERS.

Sworn to before me this
10th day of November, 1931.

756

ANDERSON WOODS,
Notary Public,
(Seal) Kings County No. 335.
Certificate filed in N. Y. County No. 395.
Commission expires March 30, 1933.

Exhibit A.

757

(To Bill of Particulars.)

COPY OF RESOLUTIONS ADOPTED AT SPECIAL MEETING OF THE STOCKHOLDERS OF THE AMERICAN TOBACCO COMPANY HELD ON JULY 28, 1930.

(Resolution Relating to Change in Capital Stock.)

RESOLVED:

That the resolutions of the Board of Directors passed at its meeting held June 25, 1930, deeming and declaring it advisable that the authorized capital stock of the Company should be altered and changed as therein provided, be approved, and that in accordance therewith the presently authorized Capital Stock of this Company, consisting of $204,010,600, divided into 540,106 shares of Preferred Stock of the par value of $100 each entitled to two votes for each share, 1,000,000 shares of Common Stock of the par value of $50 each entitled to one vote for each share, and 2,000,000 shares of Common Stock B of the par value of $50 each without voting rights, be changed, and the number of shares thereof be increased, in the following particulars and manner:

758

(a) by increasing the authorized number of shares of Common Stock to 2,000,000 shares, and the authorized number of shares of Common Stock B to 4,000,000 shares;

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(b) by changing the par value of the Common Stock to $25 per share, and changing the par value of the Common Stock B to $25 per share;

(c) by changing each outstanding share of the present Common Stock into two shares of the Common Stock so to be authorized, and changing each outstanding share of the present Common Stock B into two shares of the Common Stock B so to be authorized;

(d) by readjusting the voting rights of the Preferred Stock so that such rights shall be increased from two to four votes per share;

and, in conformity with and to enable giving effect to the foregoing, that the charter or agreement and act of merger or consolidation of this Company be altered and amended by changing Article IV thereof, so that after such change the authorized Capital Stock of the Company shall be as therein stated and such Article shall read as follows:

ARTICLE IV. The capital stock of the said merged Company is $204,010,600. Five Hundred Forty Thou-
761 sand One Hundred and Six (540,106) shares shall be Preferred Stock of the par value of $100 each. Two Million (2,000,000) shares shall be Common Stock of the par value of $25 each, and Four Million (4,000,000) shares shall be Common Stock B of the par value of $25 each. The rights of the holders of the said Preferred Stock, Common Stock and Common Stock B, respectively, shall be as follows: The holders of the Preferred Stock shall be entitled to four votes for each share of the par value of $100 held by them, and the holders of the Common Stock shall be entitled to one vote for each share of the par value of $25 held by them, but the holders of Common Stock B shall be entitled to no voting rights. The holders of the Preferred Stock shall be entitled to receive out of the
762 surplus or out of the net profits, and the merged corporation shall be bound to pay thereon as and when declared by the Board of Directors, a dividend at the rate of, but never exceeding, six per centum per annum, cumulative, from and after the 1st day of October, 1904, payable yearly, half yearly, or quarterly, before any dividend shall be set apart or paid on the Common Stock or Common Stock B; provided, however, that when all accrued dividends on the Preferred Stock have been paid, the Directors shall, if in their

judgment the surplus or the net profits, after deducting the amount of dividends to accrue on the Preferred Stock during the current year, shall be sufficient for such purpose, have power in their discretion to declare and pay a dividend, or dividends, on the Common Stock and Common Stock B. The Common Stock and Common Stock B, with respect to each share of either outstanding, shall have equal rights in the matter of dividends. In case of liquidation, or dissolution, or distribution of assets of the said merged corporation, the holders of Preferred Stock shall be paid the par amount of their Preferred shares and the amount of dividends accumulated and unpaid before any amount shall be payable or paid to the 764
holders of the Common Stock or the Common Stock B; the balance of the assets of said merged corporation shall be divided ratably among the holders of the Common Stock and the Common Stock B, share and share alike, without distinction between shares of the Common Stock and the Common Stock B.

that the foregoing changes, alterations and amendments be effected simultaneously; that, in the event such changes, alterations and amendments shall be made effective, the proper officers of this Company be and they hereby are authorized and directed forthwith thereafter to issue or cause to be issued certificates of stock, in exchange for outstanding certificates for the presently authorized stock, 765
in accordance with and upon the basis hereinbefore set forth, and to fix the time, place and conditions under which such exchange may be made.

766

Exhibit A-1.

(To Bill of Particulars.)

Resolution Adopted at Special Meeting of the Stockholders of The American Tobacco Company on July 28, 1930.

(Relating to Employees' Stock Subscription Plan.)

Whereas, the officers of the Company have formulated a plan to accord to such employees of The American Tobacco Company and its subsidiaries and to those actively engaged in the conduct of its or their business, as may be selected as therein provided, by way of additional com-
767 pensation for services to be rendered, an opportunity to purchase the capital stock of the Corporation and to participate in the other benefits of the plan; and

Whereas, said plan has been considered by the Board of Directors and by resolution duly passed at its meeting held on June 25, 1930, the Board of Directors declared that in its opinion the adoption of said plan is advisable; and

Whereas, the plan so formulated and approved and sent to the stockholders with the notice of this meeting has been presented at this meeting, and we are of the opinion that it will be in the best interests of the Company to adopt the same;

768 Now, therefore, be it Resolved, that the said plan be and the same hereby is approved and adopted.

Further Resolved, that the President, the Board of Directors and other proper officers of the Company be and they hereby are authorized, directed and empowered, to take all such steps and do any and all such acts and things that may be authorized by the terms of said plan as well as any and all such other acts and things as may be necessary and proper to execute, carry out and accomplish the full purpose and intent of said plan and of this resolution.

Order of Consolidation.

769

At a Stated Term of the United States District Court for the Southern District of New York, held at the Post Office Building in the Borough of Manhattan, City of New York, on the 6 day of November, 1931.

Present:

HON. JOHN M. WOOLSEY,
District Judge.

RICHARD REID ROGERS, Plaintiff, against THE AMERICAN TOBACCO COMPANY and T. R. TAYLOR, Defendants.	E. 59-69	770
RICHARD REID ROGERS, Plaintiff, against GUARANTY TRUST COMPANY OF NEW YORK, JUNIUS PARKER, GEORGE W. HILL, C. F. NEILEY, A. C. MOWER, V. RIGGIO, CHARLES A. PENN, J. B. HARVIE, R. J. BOYLAN, C. S. KEENE, J. K. FLETCHER and THE AMERICAN TOBACCO COMPANY, Defendants.	E. 59-307	771

A motion having been made in the above-entitled causes for an order consolidating said causes, and after hearing William M. Parke, Esq., of counsel, for defendants The American Tobacco Company, T. R. Taylor, George W. Hill, V. Riggio, J. B. Harvie, R. J. Boylan and Charles

772 *Order of Consolidation.*

A. Penn (now deceased), in support of the motion, and Richard Reid Rogers *sua persona* for plaintiff in opposition thereto,

Now, on motion, it is hereby

Ordered that the above-entitled causes be and the same hereby are consolidated into one action in this court, and that the orders and proceedings theretofore had in said causes are hereby made orders and proceedings in this cause, and that the consolidated cause receive the title of Richard Reid Rogers, Plaintiff, against the above-named
773 defendants; in equity No. 59-307, consolidated cause.

WOOLSEY,
United States District Judge.

Plaintiff consents to the form of the order but excepts to the order itself.

RICH'D REID ROGERS.

774

Order for Better Particulars, etc. 775

At a Stated Term of the United States District Court for the Southern District of New York, held at the Post Office Building in the Borough of Manhattan, City of New York, on the 6th day of November, 1931.

Present:

HON. JOHN M. WOOLSEY,
District Judge.

RICHARD REID ROGERS,
Plaintiff,
against
GUARANTY TRUST COMPANY OF NEW YORK, JUNIUS PARKER, GEORGE W. HILL, C. F. NEILEY, A. C. MOWER, V. RIGGIO, CHARLES A. PENN, J. B. HARVIE, R. J. BOYLAN, C. S. KEENE, J. K. FLETCHER and THE AMERICAN TOBACCO COMPANY,
Defendants. } E. 59-307

776

A motion having been made by defendants George W. Hill, V. Riggio, J. B. Harvie, R. J. Boylan, The American Tobacco Company and Charles A. Penn (now deceased), for an order requiring plaintiff to amend his bill of complaint by setting out a further and better statement of the nature of plaintiff's claim and further and better particulars of the matters stated in plaintiff's complaint, in accordance with the notice of such motion, and for an order striking out paragraph 17 of the bill of complaint, and after hearing William M. Parke, Esq., of counsel, for defendants George W. Hill, V. Riggio, J. B. Harvie, R. J. Boylan, The American Tobacco Company and Charles A. Penn (now deceased), in support of the motion, and

777

Richard Reid Rogers *sua persona* for plaintiff in opposition thereto,

Now, on motion, it is

Ordered that defendants' motion to compel plaintiff to amend his bill of complaint by setting out a further and better statement of the nature of plaintiff's claim and further and better particulars of the matters stated in plaintiff's complaint be, and the same hereby is, granted as follows:

1. That the plaintiff be required to allege further
779 and better particulars as to the matters stated in paragraph 5 of the bill of complaint by setting out an exact copy of the program devised by the Board of Directors of defendant The American Tobacco Company at the meeting held on June 25, 1930.

2. That the plaintiff be required to allege further and better particulars as to the matters stated in paragraph 7 of the bill of complaint by setting forth

(a) whether plaintiff is referring to the statute law of New Jersey or the case law of New Jersey, and, if plaintiff refers to the statute law of New Jersey, which particular section or sections of said law;

780 (b) an exact copy of the resolutions adopted at the special meeting of the Board of Directors.

3. That the plaintiff be required to allege further and better particulars as to the matters stated in paragraph 8 of the bill of complaint by setting out an exact copy of the notice to stockholders of the meeting to be held in Jersey City, July 28, 1930.

4. That plaintiff be required to allege further and better particulars as to the matters stated in para-

graph 9 of the bill of complaint by setting forth the complete official statement sent out by order of the Board of Directors of defendant Company over the signature of George W. Hill, its President.

5. That plaintiff be required to allege further and better particulars as to the matters stated in paragraph 11 of the bill of complaint by setting forth

(a) the resolutions voted for by the stockholders at said meeting;

(b) the number of stockholders of all classes of stock who voted in favor of said resolutions and the number of stockholders of all classes of stock who 782
voted against said resolutions;

(c) whether plaintiff has accepted the 2 shares of the new Common Stock of the par value of $25 each for each share of the $50 par value Common Stock of defendant The American Tobacco Company that he owned at the time of said meeting, and whether he accepted the 2 shares of the new Common Stock B of the par value of $25 each for each share of the $50 par value Common Stock B of defendant The American Tobacco Company that he owned at the time of said meeting.

6. That the plaintiff be required to allege further and better particulars as to the matters stated in paragraph 12 of the bill of complaint by setting forth 783

(a) whether he has received and accepted the regular dividend of $1.25 a share on the new $25 par value Common Stock and Common Stock B of defendant Company and the extra dividend of $1.00 a share on said stock, which dividends were declared on January 28, 1931, and made payable on March 1, 1931;

(b) the real value of said stock on the day that it sold on the New York Stock Exchange at $120 a share.

7. That the plaintiff be required to allege further and better particulars as to the matters stated in paragraph 13 of the bill of complaint by setting forth

(a) whether he received and accepted the extra dividend of $4.00 a share;

(b) the specific provisions of the New Jersey laws referred to in subdivision 2 of plaintiff's letter;

785

(c) the specific provisions of subdivision 1A of the law of 1920, giving the name of the State, the statutes of which the said law is a part.

8. That the plaintiff be required to allege further and better particulars as to the matters stated in paragraph 15 of the bill of complaint by setting forth

(a) the date to which plaintiff refers that the sale of said stock at $25 a share took place;

(b) the actual value as distinguished from market value of said stock at the time referred to in said paragraph.

9. That the plaintiff be required to allege further
786 and better particulars as to the matters stated in paragraph 16 of the bill of complaint by setting forth the specific provisions of the law under which the Company was organized.

10. That the plaintiff be required to allege further and better particulars as to the matters stated in paragraph 18 of the bill of complaint by setting forth the specific provisions of the law under which the plan was issued, and giving the name of the State by which the law was enacted.

11. That the plaintiff be required to allege further and better particulars as to the matters stated in paragraph 19 by setting forth

(a) a copy of the subscription agreement therein referred to between The American Tobacco Company, Guaranty Trust Company of New York and Junius Parker;

(b) a copy of the subscription agreement entered into by the said trustees with numerous employees of The American Tobacco Company.

and it is further

788

ORDERED that said defendants' motion for an order striking out paragraph 17 of the bill of complaint be, and the same hereby is, denied.

WOOLSEY,
United States District Judge.

Plaintiff consents to the form of the order but excepts to the order itself in so far as it grants further and better particulars.

RICH'D REID ROGERS.

789

790 **Stipulation.**

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK.

RICHARD REID ROGERS,
Plaintiff,

against

GUARANTY TRUST COMPANY, et al.,
Defendants.

E. 59-307

791

IT IS HEREBY STIPULATED AND AGREED, by and between the attorneys for the respective parties hereto, as follows:

1. The information directed to be furnished in this action has been furnished in an amended complaint served subsequent to the making of the motion for further particulars (which service of said amended complaint was made without prejudice to the existence of such motion), except the following:

(a) Further and better particulars as to the matters stated in paragraph 11 of the bill of complaint by setting forth

(i) the resolutions voted for by the stockholders
792 at said meeting;

(ii) the number of stockholders of all classes of stock who voted in favor of said resolutions and the number of stockholders of all classes of stock who voted against said resolutions;

(iii) whether plaintiff has accepted the 2 shares of the new Common Stock of the par value of $25 each for each share of the $50 par value Common

Stock of defendant The American Tobacco Company that he owned at the time of said meeting, and whether he accepted the 2 shares of the new Common Stock B of the par value of $25 each for each share of the $50 par value Common Stock B of defendant The American Tobacco Company that he owned at the time of said meeting. 793

(b) Further and better particulars as to the matters stated in paragraph 12 of the bill of complaint by setting forth

(i) whether he has received and accepted the regular dividend of $1.20 a share on the new $25 par value Common Stock and Common Stock B of defendant The American Tobacco Company and the extra dividend of $1 a share on said stock, which dividends were declared on January 28, 1931, and made payable on March 1, 1931. 794

(c) Further and better particulars as to the matters stated in paragraph 13 of the bill of complaint by setting forth

(i) whether he received and accepted the extra dividend of $4 a share;

(ii) the specific provisions of the New Jersey laws referred to in subdivision 2 of plaintiff's letter;

(iii) the specific provisions of subdivision 1a of the law of 1920, giving the name of the State the statutes of which the said law is a part. 795

(d) Further and better particulars as to the matters stated in paragraph 15 of the bill of complaint by setting forth

(i) the date to which plaintiff refers that the sale of said stock at $25 a share took place;

(ii) the actual value as distinguished from market value of said stock at the time referred to in said paragraph.

2. That such information shall be furnished in the form of a bill of particulars in lieu of the service of an amended complaint setting forth such information, but such bill of particulars shall be deemed for the purposes of any motion that may be made by any party to this action as if incorporated and set forth at length in the amended complaint.

797 3. Such information shall be furnished in the form of a verified bill of particulars within ten (10) days after service of a copy of an order granting the undersigned defendants' motion for further particulars.

4. The undersigned defendants' time to answer, move or otherwise plead with reference to the amended complaint shall be extended to and including twenty (20) days after service of the verified bill of particulars.

Dated, New York, November 6th, 1931.

RICH'D REID ROGERS,
Plaintiff, *sua persona.*

798 CHADBOURNE, STANCHFIELD & LEVY,
Attorneys for Defendants Hill, Riggio, Harvie, Boylan and The American Tobacco Company.

SO ORDERED:

WOOLSEY,
United States District Judge.

November 6, 1931.

Order for Better Particulars, etc. 799

At a Stated Term of the United States District Court for the Southern District of New York, held at the Post Office Building, in the Borough of Manhattan, City of New York, on the 6th day of November, 1931.

Present:

HON. JOHN M. WOOLSEY,
District Judge.

RICHARD REID ROGERS,
Plaintiff,
against
THE AMERICAN TOBACCO COMPANY and T. R. TAYLOR,
Defendants.

E. 59-69 800

A motion having been made by defendants for an order requiring the plaintiff to amend his amended bill of complaint by setting out a further and better statement of the nature of plaintiff's claim and further and better particulars of the matters stated in plaintiff's amended complaint, and for an order striking out paragraph 19 of the amended bill of complaint;

And after hearing William M. Parke, Esq., of counsel 801
for defendants, in support of the motion, and Richard Reid Rogers, *sua persona*, for plaintiff, in opposition thereto;

Now, on motion of Chadbourne, Stanchfield & Levy, attorneys for defendant The American Tobacco Company, and William M. Parke, Esq., attorney for defendant T. R. Taylor,

IT IS ORDERED, that defendants' motion to compel plaintiff to amend his amended bill of complaint by setting out a further and better statement of the nature of plaintiff's claim be and the same hereby is granted as follows:

1. That the plaintiff be required to allege further and better particulars as to the matters stated in paragraph 6 of the amended bill of complaint, by setting out an exact copy of the program devised by the Board of Directors of defendant The American Tobacco Company at the meeting held on June 25, 1930.

803 2. That plaintiff be required to allege further and better particulars as to the matters stated in paragraph 8 of the amended bill of complaint, by setting forth

(a) whether plaintiff is referring to the statute law of New Jersey or the case law of New Jersey, and, if plaintiff refers to the statute law of New Jersey, which particular section or sections of said law;

(b) an exact copy of the resolutions adopted at the special meeting of the Board of Directors.

3. That plaintiff be required to allege further and better particulars as to the matters stated in paragraph 9 of the amended bill of complaint, by setting 804 out an exact copy of the notice to stockholders of the meeting to be held in Jersey City July 28, 1930.

4. That plaintiff be required to allege further and better particulars as to the matters stated in paragraph 10 of the amended bill of complaint, by setting forth the complete official statement sent out by order of the Board of Directors of defendant Company over the signature of George W. Hill, its President.

5. That plaintiff be required to allege further and better particulars as to the matters stated in paragraph 12 of the amended bill of complaint, by setting forth

(a) the resolutions voted for by the stockholders at said meeting;

(b) the number of stockholders of all classes of stock who voted in favor of said resolutions and the number of stockholders of all classes of stock who voted against said resolutions;

(c) whether plaintiff has accepted the 2 shares of the new Common Stock of the par value of $25 each for each share of the $50 par value Common Stock of defendant Company that he owned at the time of said meeting, and whether he accepted the 2 shares of the new Common Stock B of the par value of $25 each for each share of the $50 par value Common Stock B of defendant Company that he owned at the time of said meeting. 806

6. That plaintiff be required to allege further and better particulars as to the matters stated in paragraph 13 of the amended bill of complaint, by setting forth whether he has received and accepted the regular dividend of $1.25 a share on the new $25 par value Common Stock and Common Stock B of defendant Company and the extra dividend of $1.00 a share on said stock, which dividends were declared on January 28, 1931, and made payable on March 1, 1931. 807

7. That plaintiff be required to allege further and better particulars as to the matters stated in paragraph 14 of the amended bill of complaint, by setting forth

(a) whether he received and accepted the extra dividend of $4.00 a share;

(b) the specific provisions of the New Jersey laws referred to in subdivision 2 of plaintiff's letter;

(c) the specific provisions of subdivision 1A of the law of 1920, giving the name of the State, the statutes of which the said law is a part.

8. That the plaintiff be required to allege further and better particulars as to the matters stated in paragraph 16 of the amended bill of complaint, by setting forth

(a) the date to which plaintiff refers that the
809 sale of said stock at $25 a share took place;

(b) the actual value, as distinguished from market value, of said stock at the time referred to in said paragraph.

9. That the plaintiff be required to allege further and better particulars as to the matters stated in paragraph 18 of the amended bill of complaint, by setting forth the specific provisions of the law under which the plan was issued and giving the name of the State by which the law was enacted.

10. That the plaintiff be required to allege further and better particulars as to the matters stated in paragraph 20 of the amended bill of complaint, by
810 setting forth a copy of the subscription agreement therein referred to.

11. That the plaintiff be required to allege further and better particulars as to the matters stated in paragraph 22 of the amended bill of complaint, by setting forth a copy of the official circular sent out by the Directors and President Hill after this suit was begun.

And

IT IS FURTHER ORDERED, that defendants' motion to strike out paragraph 19 of the amended bill of complaint be and the same hereby is denied.

WOOLSEY,
United States District Judge.

Plaintiff consents to form of the order, but excepts to the order itself in so far as it grants further and better particulars.

RICH'D REID ROGERS.

Stipulation. 812

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK.

RICHARD REID ROGERS, Plaintiff, against THE AMERICAN TOBACCO COMPANY and T. R. TAYLOR, Defendants.	E. 59-69

IT IS HEREBY STIPULATED AND AGREED, by and between 813
the attorneys for the respective parties hereto, as follows, that:

1. This cause having been consolidated with Richard Reid Rogers v. Guaranty Trust Company, et al., E. 59-307, the amended complaint heretofore served in the Guaranty Trust Company case, E. 59-307 (which amended complaint was served after the making of a motion for further particulars and the service of which was made without preju-

dice to such motion), shall serve as an amended complaint in this action, and that any answer or answers filed by the defendants other than Guaranty Trust Company and Parker in said Guaranty Trust Company case, E. 59-307, shall be deemed for all purposes as an answer in this suit.

2. The bill of particulars to be furnished in accordance with the stipulation of even date herewith in the Guaranty Trust Company suit shall likewise serve as a bill of particulars in this cause, in lieu of the service of an amended complaint setting forth those particulars.

3. The information furnished by the bill of particulars
815 in the Guaranty Trust Company case, E. 59-307, shall be deemed for the purposes of any motion that may be made by any party to this action as if incorporated at length in the amended complaint.

4. The undersigned defendants' time to move, answer, or plead to the amended complaint herein, viz., the amended complaint in the Guaranty Trust Company case, E. 59-307, serving as the amended complaint in this cause, shall be extended to and including twenty (20) days after service of a verified bill of particulars in the Guaranty Trust Company case, E. 59-307.

Dated, New York, November 6th, 1931.

RICH'D REID ROGERS,
816 Plaintiff, *sua persona.*

CHADBOURNE, STANCHFIELD & LEVY,
Attorneys for Defendant The American Tobacco Company.

WILLIAM M. PARKE,
Attorney for Defendant T. R. Taylor.

SO ORDERED:

WOOLSEY,
United States District Judge.

November 6, 1931.

Opinion.

817

#156

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

[TITLES OF BOTH ACTIONS.]

RICHARD REID ROGERS *pro se.*

CHADBOURNE, STANCHFIELD & LEVY, for defendants George W. Hill, Vincent Riggio, J. B. Harvie, R. J. Boylan and The American Tobacco Company.

WILLIAM M. PARKE, for defendant T. R. Taylor (VICTOR J. DOWLING, LOUIS S. LEVY, GEORGE W. WHITESIDE, 818
J. ARTHUR LEVE, of New York, and J. EDWARD ASHMEAD and MERRITT LANE, of New Jersey, of Counsel).

DAVIS, POLK, WARDWELL, GARDINER & REED, for defendants Guaranty Trust Company of New York and Junius Parker.

PATTERSON, *D. J.:* This suit is brought by a stockholder of the American Tobacco Company suing in his derivative right against the company, its directors and certain trustees who hold some 56,712 shares of its common stock. The suit was commenced in the New York Supreme Court and came here by removal proceedings. The plaintiff's 819
object is to enjoin the distribution of the shares among the directors and others connected with the company and to obtain the cancellation of the shares. Issue having been joined, the case comes up on the plaintiff's motion to strike out four defenses pleaded by the defendants and for judgment on the pleadings.

According to the amended bill, the American Tobacco Company is a New Jersey corporation, but its principal office is in New York, where the chief executives have their

headquarters, the board of directors hold their meetings and the corporate records are kept. The board of directors at a meeting on June 25, 1930, passed a resolution declaring the advisability of increasing the number of shares of common stock and reducing the par value of each share, and also a resolution formulating and declaring advisable a plan of issuing and selling shares of common stock to employees and those actively engaged in the conduct of its business. This plan, styled the "Employees' Stock Subscription Plan," made reference to New Jersey Laws of 1920, chapter 175, to the effect that a corporation may provide a plan for issuing or selling stock to those working for it and for aiding them in paying for the stock, and
821 that to carry out the plan the directors may formulate it, pass a resolution in favor of it and thereafter call a stockholders' meeting, the plan to become operative in case two thirds in interest of the stockholders vote for it. The Employees' Stock Subscription Plan in this case recited that the board of directors might offer and allot shares for subscription to such employees and those actively engaged in the business as the president might determine, by way of additional compensation for their services; that no one should be deemed ineligible because he was a director; and that the price of the shares should be not less than par value.

The next step in corporate sequence referred to in the amended bill was the stockholders' meeting on July 28,
822 1930. At this meeting more than the requisite number of each class of stockholders voted in favor of both measures recommended by the board of directors—the increase in number of shares to 6,000,000 with the reduction of par value to $25 per share, and the adoption of the "Employees' Stock Subscription Plan." At a meeting of the board of directors held on January 28, 1931, the plan was put into execution. The president submitted the names of some 529 persons and the number of shares to be allotted to each. The shares totalled 56,712. On the list of names

submitted were those of all the directors, and the number of shares recommended for them was 32,770. The board thereupon passed resolutions adopting the president's report and allotting the shares for subscription to the persons named in the list at the price of $25 a share, said to be by way of additional compensation for services to be rendered for the year 1931. The shares were sold to the Guaranty Trust Company and Junius Parker as trustees for the participants, to be turned over to the latter upon payment of the price but not prior to the close of the year 1931. The plaintiff says that at the time when the shares were so allotted to the directors and others at $25 a share, the market value of the stock on the New York Stock Exchange was $112 a share. As soon as the plaintiff 824 learned of the allotment, he protested to the directors and demanded that the stock issue be halted, but his protest went unheeded.

As further facts said to indicate deceit and suppression of the truth by the directors, the plaintiff sets forth in considerable detail several earlier transactions wherein it is alleged that the same directors or some of them had received large sums of money and large blocks of stock at the expense of the corporation and without disclosure to the stockholders. For present purposes, it is unnecessary to pursue this portion of the amended bill, because the plaintiff asks for no relief in this suit as to these matters. His attack is upon the "Employees' Stock Subscription Plan" and upon the shares issued under it. He charges 825 that the entire plan is void under the Act of 1920, because the directors, being then potential beneficiaries of the plan, were not qualified to pass the original resolution recommending it, and also because the statute contemplated a plan whose benefits would be available to any and all employees, whereas this plan was only for the benefit of such persons as the president might select. As another ground of invalidity, he says that the plan, in its provision that the stock offering should serve as compensation for future

services, is contrary to chapter 195 of Laws of 1917, which deals with the kinds of consideration for which stock of New Jersey corporations may be issued. The plaintiff also charges that the plan as carried out by the January resolutions of the board is void because it is a "fraud upon the statute," meaning presumably a perversion of the true purpose and effect of the 1920 act, and also because the stock was not first offered pro rata to the stockholders as required by chapter 318 of the Laws of 1926.

The relief demanded is an injunction against any further steps toward carrying out the plan, cancellation of the shares of stock issued under it, and an accounting and damages.

827 The third defense in the answer is that the matters raised in the suit involve the internal management of a foreign corporation and present questions of construction of New Jersey statutes, and that the court should for this reason decline to take jurisdiction. This is a defense in point of law arising upon the face of the bill, which may be made either by motion to dismiss or by incorporation in the answer. Equity Rule 29. As I am of opinion that the defendants' point is a valid one and that the suit cannot be maintained in this court, it is unnecessary to discuss any of the other points argued by counsel.

The general rule is that a suit having to do with the internal affairs of a corporation will not be entertained by a court sitting in another state from that in which the

828 corporation is domiciled. The rule applies to suits brought in or removed to the federal courts as well as to suits in the state courts. *Wallace* v. *Motor Products Corporation,* 25 Fed. (2nd) 655, certiorari denied in 279 U. S. 859; *Chicago Title & Trust Co.* v. *Newman,* 187 Fed. 573. It is true that in such cases there is no lack of jurisdiction in the strict sense. The disinclination of courts of equity to exercise jurisdiction is due to considerations of expediency, justice to the parties, inability to render an effective decree and the like. *Babcock* v. *Farwell,* 245 Ill. 14; *Hill* v. *Dealers Credit Corporation,* 102 N. J. Eq. 310; *Ameri-*

can Creosote Works v. *Powell,* 298 Fed. 417; *Cohn* v. *Mishkoff Costello Co.,* 256 N. Y. 102. The rule resting on foundations as broad as these, it is not easy to say in advance what cases fall under its ban. The character of the relief sought will generally be determinative. A suit to annul an election of directors of a foreign corporation will be dismissed, while a suit to compel the transfer of shares to the plaintiff on the books of the same corporation will be decided on the merits. *Travis* v. *Knox Terpezone Co.,* 215 N. Y. 259. The actual situs of the corporate business and property may also play a part in certain cases. A corporation after all is only a mode of carrying on business. If the enterprise is really a local one, with practically all its activities confined to the state where 830
suit is brought, a domicile elsewhere, purely technical, may not receive tender treatment. To remit the plaintiff to the foreign courts in cases of this type might sometimes amount to a practical denial of justice. *Richardson* v. *Clinton Wall Trunk Co.,* 181 Mass. 580; *Corry* v. *Barre Granite & Quarry Co.,* 91 Vt. 413; *Cunliffe* v. *Consumers Association,* 280 Pa. 263.

Where the suit is to restrain the issuance of shares or to cancel shares already issued by a foreign corporation, jurisdiction is generally declined. *Gregory* v. *New York etc. R. Co.,* 40 N. J. Eq. 38; *Wilkins* v. *Thorne,* 60 Md. 253; *Kimball* v. *St. Louis etc. R. Co.,* 157 Mass. 7; *Sprague* v. *Universal Voting Machine Co.,* 134 Ill. App. 379; *Boyette* v. *Preston Motors Corporation,* 206 Ala. 240. See also 831
Guilford v. *Western Union Telegraph Co.,* 59 Minn. 332, 340; *Babcock* v. *Farwell,* 245 Ill. 14, 34. Jurisdiction was not declined in *American Creosote Works* v. *Powell, supra,* where the corporation was non-resident only in that it was created by another state, and where there was apparently no controversy as to what the law of the foreign state was. See also *Ernst* v. *Rutherford & B. S. Gas Co.,* 38 App. Div. 388. But more frequently the expediency of having the legality of an issue of stock determined by the

courts of the corporate domicile has led to a dismissal of the suit. In *Kimball* v. *St. Louis etc. Ry. Co., supra,* stockholders of a Missouri corporation asked the Massachusetts courts to enjoin a proposed issue of bonds by the corporation. In dismissing the bill, Mr. Justice Holmes said: "But it seems to us clear that, as among the states of this Union, the plaintiff ought to resort in the first instance to that court which alone can declare the law of the case with authority, and can compel obedience to it by force. It would be a misuse of our powers to attempt to control the action of those courts, in a case like this, by an adjudication which would depend upon them for
833 enforcement, and which they might say had mistaken the Missouri law."

In the present case, the validity of the shares sought to be cancelled depends primarily upon the interpretation and effect of the act of 1920. The directors cited this statute as their authority for the plan when they formulated it and have all along insisted that the plan is in conformity with the statute. The plaintiff takes the position that the statute is not applicable and has been used by the directors merely as a cover for a raid upon the corporate treasury for their own profit. In addition, plaintiff submits that two other statutes, that of 1917 and that of 1926, must be taken as limiting the operation of the 1920 act. It is obvious that the case presents not merely questions of fact but questions of some complexity under the
834 New Jersey laws. There seem to be no decisions of the New Jersey courts to serve as a guide in the proper construction and possible interrelation of these statutes. The legality of the corporate proceedings which resulted in the issuance of this stock is peculiarly a matter for determination in the first instance by the New Jersey courts.

It may be noted that the American Tobacco Company is not a local enterprise. While its chief office is said to be here and it unquestionably carries on business here, its activities are known to be world-wide. It has a New Jersey charter; it refers to the New Jersey office as its

principal office; it holds its stockholders' meetings there. It is not a resident corporation in any sense of the word.

The plaintiff points out that in a proceeding last year in the New York courts he sought and obtained, over the company's strenuous opposition, an order allowing him to examine the corporate books and records, that the higher courts affirmed the order, and that one of the grounds relied upon by the company to defeat him was that it was a foreign corporation. The company's resistance to that proceeding would seem ill-advised, and I concur with everything stated in the able opinion of Mr. Justice Townley in that case. A stockholder acting in good faith has the right to inspect books and records kept in the state by a foreign corporation doing business here. There is 836
no interference with the internal affairs of the company; no substantive rights of the stockholder or of anyone else are adjudicated in such a proceeding. But this does not mean that the New York courts would accept jurisdiction of a suit like the present one, to cancel shares of stock issued by a foreign corporation where the validity of the shares turns upon the construction and effect of the laws of the corporate domicile. From recent cases in the Court of Appeals, the indications are that such a suit would not be entertained. *Sauerbrunn* v. *Hartford Life Insurance Co.*, 220 N. Y. 363; *Powell* v. *United Association of Plumbers and Steamfitters*, 240 N. Y. 616; *Matter of People* (*Russian Reinsurance Co.*), 255 N. Y. 415; *Cohn* v. *Mishkoff Costello Co., supra.*

The plaintiff's motion searches the record. *Cheatham* 837
v. *Wheeling & L. E. R. Co.*, 37 Fed. (2nd) 593. Since a search of the record reveals that the cause of action set forth in the amended bill is one of which this court should decline jurisdiction, the suit must be dismissed. The dismissal, being on the ground that the court will not take jurisdiction of the case, will be without prejudice to the plaintiff's enforcement of his rights in a proper court.

(Sgd.) ROBERT P. PATTERSON.

February 16, 1932.

838 **Decree Appealed From.**

At a Stated Term of the United States District Court for the Southern District of New York, held at the Post Office Building, in the Borough of Manhattan, City of New York, on the 23rd day of February, 1932.

Present:

HONORABLE ROBERT P. PATTERSON,
District Judge.

RICHARD REID ROGERS,
Plaintiff,

839 against

GUARANTY TRUST COMPANY OF NEW YORK, JUNIUS PARKER, GEORGE W. HILL, C. F. NEILEY, A. C. MOWER, VINCENT RIGGIO, CHARLES A. PENN, J. B. HARVIE, R. J. BOYLAN, C. S. KEENE, J. K. FLETCHER and THE AMERICAN TOBACCO COMPANY,
Defendants.

Consolidated Cause E 59-307.

RICHARD REID ROGERS,
Plaintiff,

against

840 THE AMERICAN TOBACCO COMPANY and T. R. TAYLOR,
Defendants.

A motion having been made in the above-entitled cause for an order striking out the first, second, third and fourth separate defenses of the answer therein and for a decree in accordance with the prayer of the amended bill of complaint therein, or in the alternative for an order for an injunction *pendente lite,* and after hearing Richard Reid

841

Rogers, Esq., *sua persona*, for plaintiff, in support of the motion, and George W. Whiteside, Esq., of counsel for defendants George W. Hill, Vincent Riggio, J. B. Harvie, R. J. Boylan, T. R. Taylor and The American Tobacco Company and Lee McCanliss, Esq., of counsel for Guaranty Trust Company of New York and Junius Parker, in opposition thereto; and it appearing herein that the matters raised in the amended bills of complaint involve the internal management of a foreign corporation, to wit, a New Jersey corporation, and present questions for construction of New Jersey statutes; and due deliberation having been had; and upon filing the opinion of the Court;

NOW, it is hereby

842

ORDERED, that plaintiff's motion be and the same hereby is denied; and it is

FURTHER ORDERED, that, in the exercise of this Court's discretion, each of the bills of complaint herein be and the same are hereby dismissed, without prejudice to the enforcement of the rights of plaintiff, if any, in the courts of New Jersey.

ROBERT P. PATTERSON,
U. S. D. J.

(*Stamped*)

843

"U. S. District Court
Southern District of N. Y.
Filed, Feb. 23, 1932."

844 **Petition for Appeal.**

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

RICHARD REID ROGERS, Plaintiff, against GUARANTY TRUST COMPANY OF NEW YORK, JUNIUS PARKER, GEORGE W. HILL, C. F. NEILEY, A. C. MOWER, VINCENT RIGGIO, CHARLES A. PENN, 845 J. B. HARVIE, R. J. BOYLAN, C. S. KEENE, J. K. FLETCHER and THE AMERICAN TOBACCO COMPANY, Defendants.	E 59-307 Consolidated Cause.
RICHARD REID ROGERS, Plaintiff, against THE AMERICAN TOBACCO COMPANY and T. R. TAYLOR, Defendants.	

846 The above-named plaintiff, conceiving himself aggrieved by the order and decree made and entered on the 23rd day of February, 1932, in the above-entitled cause, and the opinion of the District Court rendered prior to the entry of said order and decree, hereby appeals from said order and decree to the United States Circuit Court of Appeals for the Second Circuit dismissing the bills of complaint herein and denying the motion of the plaintiff for an injunction *pendente lite,* for the reasons specifically set forth in the assignment of errors which is filed herewith;

847

and he prays that the appeal may be allowed, and after due hearing for such further relief as justice may require.

Dated, New York, N. Y., February 24, 1932.

RICHARD REID ROGERS,
Plaintiff *pro se*,
Office & P. O. Address,
74 Trinity Place,
Borough of Manhattan,
City of New York.

848

IT IS ORDERED that the above-mentioned appeal be and it is hereby allowed on condition that the plaintiff file a bond as required by law in the sum of Two hundred and fifty Dollars ($250) as security for costs on said appeal.

Dated, New York, New York, February 24th, 1932.

HENRY W. GODDARD,
U. S. D. J.

Assignment of Errors.

849

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

[TITLES OF BOTH ACTIONS.]

The plaintiff in the above-entitled cause in connection with his petition for the allowance of an appeal herein respectfully makes the following assignment of errors which (in addition to other errors not hereby assigned)

occurred in the order and decree from which said appeal is taken and in the opinion of the District Court rendered prior to the entry of said order and decree, to wit:

1. The Court erred in dismissing the bills of complaint herein.

2. The Court erred in denying the plaintiff's motion for an injunction *pendente lite.*

3. The Court erred in holding that the matters raised in the bills of complaint involve the internal management of a foreign corporation, to wit, a New Jersey corporation.

851 4. The Court erred in holding that the cause is one of which it should decline jurisdiction.

WHEREFORE, plaintiff prays that the order and decree of the District Court may be reversed, and for such other and further relief as justice may require.

RICHARD REID ROGERS,
Plaintiff *pro se,*
Office & P. O. Address,
74 Trinity Place,
Borough of Manhattan,
City of New York.

852

Stipulation as to Record.

853

IT IS HEREBY STIPULATED AND AGREED that the foregoing is a true and correct transcript of the record of the United States District Court for the Southern District of New York in the above-entitled action, and that the same may be settled and ordered on file herein.

Dated, New York, N. Y., March 17th, 1932.

RICHARD REID ROGERS,
Plaintiff *pro se.*

CHADBOURNE, STANCHFIELD & LEVY,
Attorneys for Defendants The American Tobacco Company, George W. Hill, Vincent Riggio, J. B. Harvie and R. J. Boylan. 854

WILLIAM M. PARKE,
Attorney for Defendant T. R. Taylor.

DAVIS, POLK, WARDWELL, GARDINER & REED,
Attorneys for Defendants Guaranty Trust Company of New York and Junius Parker.

Order Settling Case.

Pursuant to the foregoing stipulation, the foregoing transcript is hereby settled as a true and correct transcript of the record of said action in this Court, and as such it is ordered on file herein. 855

Dated, New York, N. Y., March 18th, 1932.

ROBERT P. PATTERSON,
United States District Judge.

856

Clerk's Certificate.

UNITED STATES OF AMERICA,
SOUTHERN DISTRICT OF NEW YORK, } ss.:

I, CHARLES WEISER, Clerk of the District Court of the United States of America for the Southern District of New York, do hereby certify that the foregoing is a correct transcript of the record of the said District Court in the above-entitled cause as agreed on by the parties.

IN TESTIMONY WHEREOF, I have caused the seal of the said Court to be hereunto affixed, at the City of New York in the Southern District of New York, this 19th day of March, in the year of our Lord one thousand nine hundred
857 thirty-two and of the Independence of the said United States the one hundred fifty-sixth.

CHARLES WEISER,
(Seal) Clerk.

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IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

RICHARD REID ROGERS, Appellant,

against

GUARANTY TRUST COMPANY OF NEW YORK, JUNIUS PARKER, George W. Hill, Vincent Riggio, J. B. Harvie, R. J. Boylan, and The American Tobacco Company, Appellees, and C. F. Neiley, A. C. Mower, J. K. Fletcher, Charles A. Penn (Deceased), and C. S. Keene (Deceased), Defendants

RICHARD REID ROGERS, Appellant,

against

THE AMERICAN TOBACCO COMPANY and T. R. TAYLOR, Appellees

Before Manton, Swan, and Chase, Circuit Judges

Appeal from the District Court for the Southern District of New York. These suits are by a stockholder to enjoin the execution of an employees stock subscription plan authorized by the stockholders of The American Tobacco Company. Judgments for defendants dismissing the bills. Decrees affirmed.

Richard Reid Rogers, Esq., Plaintiff-Appellant, pro se.

Chadbourne, Stanchfield & Levy, Esqs., Attorneys for Appellees George W. Hill, Vincent Riggio, J. B. Harvie, R. J. Boylan, and The American Tobacco Company.

William M. Parker, Esq., Attorney for Appellee T. R. Taylor.

Davis, Polk, Wardwell, Gardiner & Reed, Esqs., Attorneys for Appellees Guaranty Trust Company and Junius Parker. John W. Davis, Esq., Victor J. Dowling, Esq., George W. Whiteside, Esq., J. Arthur Leve, Esq., of Counsel.

OPINION

MANTON, Circuit Judge:

Appellant, a stockholder of 200 shares of common and 400 shares of common B stock of The American Tobacco

Company, a New Jersey corporation, seeks by these suits, which have been consolidated, to enjoin the execution of an employees' stock subscription plan approved by the directors of the corporation on June 25, 1930 and by the stockholders on July 28, 1930. He has joined as defendants with the company, the Guaranty Trust Company and Junius Parker, as trustees of 56,712 shares of the common B stock, and the directors of The American Tobacco Company. These shares of stock were distributed among the directors and 527 other employees of the corporation, and the relief sought is the cancellation of the shares issued.

Four defenses were interposed in the answer filed and a motion to strike out such defenses was made. The court, in the exercise of its discretion, declined to entertain jurisdiction of the bill for the reason that the corporation existed under the laws of the State of New Jersey and it held that the court of the domicile of the corporation was the forum to which appellant should appeal. The complaints were dismissed.

The American Tobacco Company has its principal office in New York City, where its chief executives are located and where its board of directors hold- its meetings and keeps its corporate records.

The defenses which were sought to be stricken out are (a) that the appellant failed to comply with the provisions of Federal Equity Rule 27; (b) that the stockholders of the corporation, including the appellant, ratified the action of the board of directors in the allotments made to the members of the board under the employees stock plan by re-electing them to the board, thus making them eligible for the benefits of the plan; (c) that since the action is an attempt to regulate the internal affairs of a foreign corporation, the court below should decline to take jurisdiction; (d) that the amount of compensation paid to the individual appellees was and is fair and reasonable by virtue of the valuable services that they have rendered to the company; and under the by-laws of the corporation, the directors have the right to fix the compensation of its agents, and the allotment under the plan was in accordance therewith as well as in accordance with the statutes of New Jersey.

At a meeting of the directors on June 25, 1930, in accordance with § 2, chap. 175 of the Laws of 1920, they duly declared the advisability, and directed the submission to

the stockholders of a plan for the issuance and sale of its common B stock to employees and those actively engaged in the conduct of the business, by way of compensation for services to be rendered. Section 1, chap. 175 of the Laws of 1920 empowers a New Jersey corporation to provide and carry out a plan for the following purposes: "(a) the issue or the purchase and sale of its capital stock to any or all of its employees and those actively engaged in the conduct of its business or to trustees on their behalf, and the payment for such stock in installments or at one time with or without the right to vote thereon pending payment therefor in full, and for aiding any such employees and said other persons in paying for such stock by contributions, compensation for services, or otherwise." The stockholders met July 28, 1930 and passed two resolutions, one involving a change in the capital structure of the company, and the other authorizing the adoption of this stock subscription plan. The change in capital structure consisted in a decrease of the par value of the common stock and common B stock of the corporation from $50 to $25, and an increase of the authorized shares, in the case of common stock from one to two million shares, and in the case of common B stock from two to four million shares. The resolution also provided that the voting power of the preferred stock be increased from two to four votes in order to maintain the proper ratio. Each stockholder was to receive two shares of new stock, common or common B, for one share of old stock. There was outstanding on this date 526,997 shares of preferred stock, 778,548 shares of common and 1,535,850 shares of common B stock. The plan was approved by a vote of 389,573 preferred, 620,268 common and 1,220,855 shares of common B stock. There were voted against the resolutions 170 shares of common, 1995 shares of common B and 10 shares of preferred stock.

On January 28, 1931, the directors held a meeting which neither the president nor the vice-president Penn attended. The board adopted a resolution providing that there be submitted to the president a number of employees who, in the opinion of the board, should be considered in the allotment of stock, together with a statement of the services rendered by each and with an estimated rating, on a percentage basis, of the value of the services to the company,

as compared in each department with the key executive in such department, and the annual rate of compensation of each as of December 31, 1930, including all salary and other compensation of any kind. The board recommended that in determining the individual allotments under the plan there should be used as a general basis a number of shares of stock having an aggregate par value equal to 33⅓% of the amount of compensation paid or accrued to such individual for his services to the company for the calendar year 1930, and that "in view of the unusual ability and efficiency of the President George W. Hill, particularly in connection with sales as well as the general oversight and supervision of all the activities of the corporation and its subsidiaries, and in view of the unusual ability and efficiency of the Vice-President Charles A. Penn in connection with the manufacturing activities of the Company, this Board recommends that the said George W. Hill and Charles A. Penn be given recognition on the basis of 100 per cent rating of the value of their services to this corporation, as indicated on the list hereinabove referred to.

As a result of the meeting, there was accorded to 535 employees, including directors who were active employees, the right to subscribe to a number of shares at $25 par value upon the terms and conditions described in an agreement between the company, the respective employees, and the trustees who were named in the agreement. Under the agreement the stock certificates could not be delivered to the allottee until the purchase price, and all interest accrued thereon, should be paid in full, and, in any event, should not be delivered to the participant until after December 31, 1931. If on or before that date the connection of any employee of the company should be severed by discharge, with or without cause, or by resignation, then the trustees had the power to cancel forthwith any right such employee had under the agreement for the delivery of the stock.

The American Tobacco Company, in 1912, by a decree of the United States Supreme Court, was ordered to disintegrate (U. S. v. American Tobacco Co., 221 U. S. 106). Those companies which were permitted to continue under the decree were estimated to have at that time 37.11% of the cigarette business in the United States. However, between 1912 and 1925, due to competition, the percentage

dropped to 21.81%. In December, 1925, the appellee, Hill, became president of the company. Under his management, and in co-operation with Vice-President Penn and the rest of the Board, most of whom were employees of the company, a new policy was inaugurated in all the departments. The result of the change of policy in the operation of the business made the American Tobacco Company the leader in the cigarette industry. In 1931 the total increase of sales over 1929 of cigarettes of all kinds in this country was approximately half a billion. The increase in the sale of the company's most popular brand, "Lucky Strike", was nearly six billions. The business is world-wide in scope, with many factories, branches and organizations in all parts of this country. The company in 1930 expended $20,400,000 in advertising. In that year it sold 38.10% of the cigarettes produced in the United States. Its net earnings, after deducting all charges for management and taxes amounted to $43,294,769. It paid dividends on its common stock of $29,294,000 in 1930, with an extra dividend of $1.00 for the first quarter of 1931. The total dividends on the common stock for the latter year exceeded $28,300,000; on its preferred stock, $3,161,982. It paid the United States Government taxes of $150,000,000 in 1930. These figures give some idea of the gigantic problem confronting those engaged in the active management of the company's affairs. It has had a most unusual commercial success. The services rendered by the individual appellees have been extraordinary and unique.

On April 1, 1931, at a meeting of the stockholders, the directors were re-elected, indicating a renewed confidence of those in charge of the corporation. On January 28, 1931, it was publicly announced through the newspapers that the directors had voted to allot 56,712 shares of the company's common B stock, pursuant to the authority conferred upon them under the plan. On March 12, 1931, each stockholder of record received a statement relative to the plan showing the amount of shares allotted to the president and the five vice-presidents, and specifying the amount allotted to the various 535 employees. The statement also advised the stockholders of the operation of Art. XII of the by-laws, which had been adopted by the company on March 13, 1912. (See Rogers v. Hill, decided this day.) After this public notice, the meeting of April 1, 1931 was

held. The appellant gave public notice of his opposition to the plan, inviting others to join him in such opposition, and at the meeting nominated a candidate for director against Mr. Hill. He voted for all the directors except Mr. Hill. The directors were re-elected by a vote varying from 2,608,201 to 2,615,973. The opposition candidate received 11,980 votes. There were at the time approximately 40,000 stockholders in the company.

Appellant argues (a) that the directors' participation in the plan made it illegal ab initio; (b) that under the plan the stock was issued for services to be rendered and this is unlawful because the stock of a New Jersey corporation can be lawfully issued only for the amount that such corporation actually paid for labor performed; (c) that the sale to the directors was for $25 per share whereas the stock was selling on the exchange market for $112 per share.

As to (a), ample notice was given to the stockholders of the directors' participation and their respective amounts. The New Jersey statute (Laws of 1920, chap. 175, §1), quoted above, includes within its terms such a plan as was here intended and contemplated.

It has been long recognized that in corporate transactions, where directors have an interest, the stockholders of the corporation have full power to authorize and ratify their acts if the existence of an interest is disclosed. Hodge v. U. S. Steel Corp., 64 N. J. Eq. 807; Pierce v. Old Dominion Co., 67 N. J. Eq. 399; Lilliard v. Oil, Paint and Drug Co., 70 N. J. Eq. 197. When a contract is entered into by the stockholders with the directors, or the stockholders expressly authorize the directors to enter into a contract and the stockholders have notice of the directors' interest, the agreement is unassailable in the absence of actual fraud or want of power in the corporation. The stockholders gave authorization for and ratified the directors' interest here. Present interest of directors does not render a transaction void but merely makes it voidable at the option of the stockholders of the company as distinguished from a single stockholder. Dana v. Morgan, 232 Fed. 85 (C. C. A. 2); Pollitz v. Wabash R. R. Co., 207 N. Y. 113; Russell v. Patterson, 232 Pa. 113.

When, on June 25, 1930, the board voted on the resolution to submit the plan to the company's stockholders, the directors had no self-interest, and the record discloses that

they did not own or even control a majority of the stock on that date or at the time of the stockholders' meeting on July 28, 1930, at which time the plan was authorized. The New Jersey act required an approval by two-thirds of all classes of stock before the plan could be effective. The plan contemplated that the stock should be allotted, in part, for services that should be thereafter rendered. The stockholders were fully informed and advised that directors might obtain benefits under the plan. The notice to stockholders stated that "no employee or person * * * shall be deemed ineligible to the benefits of the Plan by reason of his being also a director of the Corporation." The later overwhelming approval of the directors' management by their re-election after the allotment was made to the employees, justified the claim that the stockholders had reiterated their former approval of the plan. As to (b), upon issuance of the stock and delivery to the trustees under the agreement, the Guaranty Trust Company paid $25 a share for each share of stock so delivered to it. Thus the American Tobacco Company received par value for the stock. The Company during the entire year received services which were rendered in part upon the agreement that this stock had to be delivered to the employees to whom it was allotted under the plan. The statute authorizes stock to be issued without being paid for in full. The language is, "the issue * * * and the payment for such stock in installments or at any one time with or without the right to vote thereon pending payment therefor in full". See: Morgan v. Bon Bon Co., 222 N. Y. 22; Vineland Grape Juice Co. v. Chandler, 80 N. J. Eq. 437.

The charter of the corporation permitted compensation to employees and officers in the form of a stock interest. It provides that the company shall have the powers conferred by §1 of the Act concerning corporations (Laws of 1896, chap. 185). Section 1 of that act provides:

"Every corporation shall have power: * * * (5) To appoint such officers and agents as the business of the corporation shall require, and to allow them suitable compensation."

The form of compensation, whether in stock or a share of the profits, is within the implied powers of the corporation.

Bennett v. Millville Improvement Co., 67 N. J. L. 320; Booth v. Beattie, 95 N. J. Eq. 776; Harker v. Ralston Purina Co., 45 Fed. (2d) 929 (C. C. A. 7); Church v. Harnit, 35 Fed. (2d) 499 (C. C. A. 6).

In the Harker case, the Seventh Circuit said:

"Every corporation has the right incidental to its expressed powers and purposes to exercise such incidental power as is necessarily implied in the legitimate achievement of its expressed powers. Among such is the employment of efficient employees. At the time appellee made the contract before us, it contracted for appellant's services for five years, and obligated itself, in consideration therefor, to sell to him some of its capital stock at a price less than its market value. By selling the stock to the employee, appellee made sure that the employee would have a personal interest in the welfare of the corporation. The natural tendency of such interest was to increase the zeal of the employee and thus to forward the chances of success in the corporation's legitimate operations. Furthermore, it enabled the faithful employee, if he continued his employment to the maturity of his contract, to partake of the profits of the corporation. In a word, the contract contemplated the insurance of faithful efficient service to the corporation and a corresponding reward to the employee. Such a contract was clearly praiseworthy in its motives from the viewpoint of both parties and the motion to repurchase was clearly included to encourage the stay of the employee to the end of the period of his employment. In view of the fact that the performance of the option would work none of the results condemned by the courts of Missouri, viz., damage to creditors, impairment of capital, or jeopardy to the financial interests of any interested party, it follows that the contract was clearly within the implied powers of the corporation."

The fact that the stock may have been selling at a higher price in the open market does not brand the employees' subscription plan as fraudulent. The stock was issued for par and in recognition of efficient services which had been rendered and the promise of like services in the future. It was not necessary to the validity of the plan that the stock allotted under it be offered first to the appellee or any other stockholder of the company. The statutory

right to such offer applies only to an issue for cash at the time the stock is stock, whereas stock allotted under this employees' plan passed first to the trustee, was paid for in cash and lawfully issued pursuant to chap. 175 of the Laws of 1920.

The allotment of the stock under the plan was authorized by 99.99% of the stock represented in person or by proxy at the stockholders' meeting. This overwhelming vote leaves little to be desired in the approval of the management of the internal affairs of this corporation by its stockholders. It is only where actual fraud, and not alleged constructive fraud, is established that the courts should interfere. The corporation had the right to aid and encourage its employees; the board of directors and stockholders deemed it good business policy. The selling price of the stock on the market (which is always subject to fluctuation) will not justify an allegation of insufficient consideration amounting to fraud. The corporation received what those in charge of its internal affairs deemed to be sufficient as its par value. The directors had the right to select employees who, in their judgment, were entitled to benefits under the plan and to apportion to them their respective rights to subscription. This was a matter of internal management of the corporation's affairs.

Moreover, there is no allegation in the complaint setting forth a demand upon the stockholders to take action nor are there reasons stated to excuse such failure prior to the institution of these suits. Equity Rule 27 provides:

"Every bill brought by one or more stockholders in a corporation against the corporation and other parties founded on rights which may properly be asserted by the corporation, * * * must also set forth with particularity the efforts of the plaintiff to secure such action as he desires on the part of the managing directors or trustees, and, if necessary, of the shareholders, and the causes of his failure to obtain such action, or the reasons for not making such effort."

The complaint does allege a demand upon the directors in the form of a letter, and the refusal of the directors to take any action thereon within the twenty day period fixed by the plaintiff. But there were remedies, within the company, which were open to the plaintiff as a stockholder under the laws of New Jersey.

(a) Sec. 3, chap. 175 of the Laws of 1920 provides that "any plan adopted * * * may be recalled, abolished, revised, amended, altered or changed in the same manner as herein provided for its adoption * * *." (b) If the stockholders desire any change with respect to the corporate affairs any three such stockholders may call a meeting for that purpose without even calling upon the directors to take such action (Laws of 1896, chap. 185, § 46). See: Watts v. Vanderbilt, 45 Fed. (2d) 968 (C. C. A. 2); Stone v. Holly Hill Fruit Products, 56 Fed. (2) 553 (C. C. A. 5).

The appellee could have asserted these rights. The lapse of time since the plan was approved and the stock allotted thereunder and the services performed by the allottees was ample. In the Stone case, the court said:

"The minority have a right to have the majority exercise their judgment, and to exercise it honestly and not fraudulently, but have no right to have a court substitute their own ideas and wishes for those of the majority, and that in advance of any refusal of the majority to hear and decide on the matter of issue. Minority stockholders may not in the absence of sudden emergency ask a court of equity to interfere with the management of their corporation until they have earnestly and unsuccessfully sought redress from the Board of Directors, and where appropriate also from the stockholders in meeting, unless they can show sufficient reasons for not doing so. This is implied in the provisions of Equity Rule 27 (28 U. S. C. A. § 723). For defect in this respect a bill will be dismissed. Wathen v. Jackson Oil & Ref. Co., 235 U. S. 635; Corbus v. Gold Mining Co., 187 U. S. 463; Hawes v. Oakland, 104 U. S. 450; Dimpfel v. Ohio & Miss. R. R. Co., 110 U. S. 209; Memphis v. Dean, 75 U. S. 64."

The general averment that complainants had objected to the president does not meet the particular requirements of the rule. There is alleged no dominance of the board of directors or of the stockholders by those whose personal interests are adverse to the relief sought by the bill such as to make it evidently futile to expect fair consideration within the corporation. * * *"

Unless the directors were majority stockholders, it was the duty of the appellant to go to the stockholders or show

adequate reason why action in that respect would be futile. Here the directors were not majority stockholders or, indeed, in control of the company.

Courts seldom interfere in the control of the internal affairs of a corporation, except where the directors are guilty of misconduct equivalent to a breach of trust, or where they stand in a dual relationship which prevents an unprejudiced exercise of judgment, and then, as a rule, only after an application to the stockholders or a showing that there was no opportunity for such application. United Copper Co. v. Amalgamated Copper Co., 244 U. S. 261.

For these reasons the bill of complaint was properly dismissed.

Decree affirmed.

Swan, J., dissenting.

IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

[Title omitted]

Before Manton, Swan, and Chase, Circuit Judges

DISSENTING OPINION

SWAN, Cir. J., dissenting:

On the ground that the suits involved the internal affairs of a foreign corporation, the court below declined to assume jurisdiction and dismissed the complaints "without prejudice to the enforcement of the rights of the plaintiff, if any, in the courts of New Jersey". The decision of this court has affirmed that decree but has also, if I correctly understand it, undertaken to construe the New Jersey statute and to decide upon the merits that the stock in controversy was validly issued. From this conclusion I dissent.

The New Jersey statute (Ch. 175, L. 1920) pursuant to which the stock distribution in question purports to have been made, reads in part as follows:

"1. Any stock corporation formed under any law of this State may, upon such terms and conditions as may be determined in the manner hereinafter designated, provide and carry out a plan or plans for any or all of the following purposes:

(a) The issue or the purchase and sale of its capital stock to any or all of its employees and those actively engaged in the conduct of its business or to trustees on their behalf, and the payment for such stock in installments or at one time with or without the right to vote thereon pending payment therefor in full, and for aiding any such employees and said other persons in paying for such stock by contributions, compensation for services, or otherwise."

* * * * * * *

"2. Any of the privileges and powers hereinbefore granted may be exercised in the manner following:

(a) By including appropriate clauses therefor in the original articles of incorporation or by-laws at the time of organizing the corporation.

(b) Where the corporation has been formed without the said charter or by-law provisions the board of directors shall first formulate such plan or plans and pass a resolution declaring that in its opinion the adoption thereof is advisable, and shall call a meeting of the stockholders to take action thereon. The stockholders' meeting shall be held upon such notice as the by-laws provide, and in the absence of such provision upon ten days' notice given personally or by mail. If two-thirds in interest of each class of stockholders present at said meeting and voting shall vote in favor of any such plan or any modification thereof, the said plan shall thereupon become operative."

The statute also provides that a dissenting stockholder may have his stock appraised, "without regard to any depreciation or appreciation thereof in consequence of the adoption of such plan", and receive payment from the corporation, or be permitted to subscribe for his proportionate share of the new stock issued under section 1.

It will be observed that the statute requires that the board of directors shall "first formulate such plan", declare it "advisable", and call a meeting of the stockholders to take action thereon. On June 25, 1930, the directors approved what was called an "Employees' Stock Subscription Plan". It provided as follows:

"The Board of Directors may, at such time or times as it may determine, by way of additional compensation for

services to be rendered, offer and allot such stock for subscription, to employees of the Corporation, and/or its subsidiaries, and to those actively engaged in the conduct of its or their business, in such amounts and proportions, to such persons, at such prices not less than the par value of the shares allotted, payable in full or in such installments, and upon such other terms and conditions, all as shall be determined with respect to each offering of stock to each individual pursuant to authority to be granted by the Board of Directors to the President for such purpose."

On July 28, 1930, a meeting of stockholders was held and the so-called plan was approved by more than the required two-thirds vote.

It is apparent that the so-called plan submitted by the directors was in substance no more than a proposal that stock be issued to such employees, at such time, and on such terms (but at a price not less than par) as the directors and president might thereafter determine. This was not, in my opinion, "a formulated plan" such as the statute contemplated. It was a proposal that the stockholders abrogate the discretion which the statute vested in them to approve or disapprove a formulated plan declared by the directors to be advisable, and confer upon the directors and president complete discretion to determine and execute in the future, without further reference to the stockholders, any sort of allotment then thought desirable, provided only that the price to employees who were selected to share in it be not less than the par of the stock. The purpose of the statute was to let the stockholders know with some definiteness—"a formulated plan"—what the directors thought advisable, and to allow the stockholders to approve it, if at least two-thirds of them also deemed it advisable. This purpose is completely frustrated if it be sufficient to submit a plan which merely proposes that the directors shall be empowered to allot stock to employees on such terms as they may thereafter please. And the undesirability of transferring to the directors complete discretion as to what plan shall be formulated in the future is particularly apparent where, as here, they are entitled to benefit under the plan. It is aptly illustrated by what in fact happened. When the directors did formulate a definite plan, in January, 1931, it resulted in an allotment to them-

selves of nearly 33,000 shares of the total 56,712 shares to be issued to employees, and at a price of $25 per share when the market price was $112 per share. The president, who was also a director, received 13,440 shares. The size of his allotment was determined as follows: His fixed salary was $168,000 a year. He received a bonus of 2½ per cent. of the annual net profits. For the year 1930 these two amounts gave him $1,008,000. This was assumed to represent the comparative value of his services to the company. His allotment was then fixed so that the shares distributed to him would have a total par value equal to one-third of this sum. Allotments to the other director-employees were determined in a similar manner. Whether the board would have had the temerity to submit to the stockholders in advance a plan which on its face so largely benefited themselves, and whether the stockholders, however blindly they are accustomed to follow their leaders, would have approved such a plan had it been submitted in advance, can only be matter of speculation. It is true that the directors were reelected after publicity had been given to the allotments, but that is a very different thing from approving such a plan in advance, when the issue could have been considered on its merits and unencumbered by any question of ousting a successful management. This is what the statute demanded. Since its provisions were not complied with, the corporation acquired no power to issue stock to employees in derogation of the preemptive rights of shareholders. The statute provided a method of adopting what in effect was an amendment to the corporate charter. Unless the prescribed method was followed no legal amendment was effected. Consequently I believe the purported issuance by the directors of the stock in controversy was ultra vires and void.

The bills of complaint seek to have cancelled this ultra vires issue of shares. They state a cause of action which the plaintiff may enforce without first appealing to the stockholders because the stockholders have no power to ratify an issuance of stock contrary to the corporate charter; and until the charter was legally amended, that is, until the directors had procured prior approval by the stockholders of a formulated plan, there was no power to issue the stock in question. Assuming, as have my brothers, that the court should consider the merits of the controversy, I think the bills were improperly dismissed.

Whether the court below abused its discretion in declining to exercise an admitted jurisdiction based on diversity of citizenship is a matter not free from doubt. Ample authority may be found for either view. Citations in favor of the district court's position are given in its opinion; among cases pointing to an opposite conclusion the following may be cited. See American Creosote Works, Inc. v. Powell, 298 F. 417 (C. C. A. 5); Williamson v. Missouri-Kansas Pipe Line Co., 56 F. (2d) 503 (C. C. A. 7); Kraft v. Griffon Co., 82 App. Div. 29; Cuppy v. Ward, 176 N. Y. Supp. 233, 239, affirmed, 227 N. Y. 603; Edwards v. Schillinger, 245 Ill. 231, 241; Busch v. Mary A. Riddle Co., 92 N. J. Eq. 265; cf. also, Loan Society of Phila. v. Eavenson, 241 Pa. St. 65; Sprague v. Universal Voting Machine Co., 134 Ill. App. 379, 383; Babcock v. Farwell, 245 Ill. 14, 33 et seq; and see 44 Harv. L. Rev. 437, 439. Admittedly it is a matter solely of convenience and expediency. Lack of power to render an effective decree is the reason most frequently assigned for refusal to take jurisdiction. No such obstacle is present in the case at bar. The plaintiff and a majority of the defendants, including the putative holder of the stock sought to be cancelled, are citizens of New York. It is not likely that the domiciliary courts would fare so well in obtaining jurisdiction over the necessary parties. See Berendt v. Bethlehem Steel Corp., 154 Atl. 321, 322 (N. J. Ch.). The consideration which seemed most persuasive to the court below was that the determination of the merits would require it to construe the applicable New Jersey statute without an authoritative guide from the courts of that state. But this is a duty which courts are frequently called upon to perform. Where the question presented is no more complicated than in the case at bar this affords no ground in itself for refusal to exercise jurisdiction.

For the reasons stated I am of the opinion that the decree should be reversed.

In United States Circuit Court of Appeals, Second Circuit

Richard Reid Rogers, Plaintiff-Appellant,

vs.

Guaranty Trust Company of New York et al., Defendants-Appellees

(and another case)

DECREE—Filed June 20, 1932

Appeal from the District Court of the United States for th
Southern District of New York

This cause came on to be heard on the transcript o
record from the District Court of the United States for th
Southern District of New York and was argued by counse

On consideration whereof, it is now hereby ordered, ad
judged, and decreed that the decree of said District Cour
be, and it hereby is, affirmed, with costs.

It is further ordered that a Mandate issue to the sai
District Court in accordance with this decree.

Wm. Parkin, Clerk

[File endorsement omitted.]

Clerk's certificate to foregoing transcript omitted i
printing.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 17, 1932

The petition herein for a writ of certiorari to the Unite
States Circuit Court of Appeals for the Second Circuit i
granted. And it is further ordered that the duly certifie
copy of the transcript of the proceedings below which ac
companied the petition shall be treated as though filed i
response to such writ.

Endorsed on cover: File No. 36,924. U. S. Circuit Cour
of Appeals, Second Circuit. Term No. 227. Richard Reid
Rogers, petitioner, vs. Guaranty Trust Company of New
York, Junius Parker, George W. Hill, et al. Petition for a
writ of certiorari and exhibit thereto. Filed July 15, 1932
File No. 36,924.

FILED
JUL 15 1932
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1932.

No. 227

RICHARD REID ROGERS,

Petitioner,

against

GUARANTY TRUST COMPANY OF NEW YORK, JUNIUS PARKER, GEORGE W. HILL, C. F. NEILEY, A. C. MOWER, VINCENT RIGGIO, CHARLES A. PENN, J. B. HARVIE, R. J. BOYLAN, C. S. KEENE, J. K. FLETCHER and THE AMERICAN TOBACCO COMPANY,

Respondents.

RICHARD REID ROGERS,

Petitioner,

against

THE AMERICAN TOBACCO COMPANY and T. R. TAYLOR,

Respondents.

Consolidated Cause.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF.

RICHARD REID ROGERS, *pro se,*
EVAN SHELBY,
Of Counsel for Petitioner,
74 Trinity Place,
New York City.

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Petition

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Supreme Court of the United States

OCTOBER TERM, 1932.

No. .

RICHARD REID ROGERS, Petitioner, against GUARANTY TRUST COMPANY OF NEW YORK, JUNIUS PARKER, GEORGE W. HILL, C. F. NEILEY, A. C. MOWER, VINCENT RIGGIO, CHARLES A. PENN, J. B. HARVIE, R. J. BOYLAN, C. S. KEENE, J. K. FLETCHER and THE AMERICAN TOBACCO COMPANY, Respondents.	Consolidated Cause.
RICHARD REID ROGERS, Petitioner, against THE AMERICAN TOBACCO COMPANY and T. R. TAYLOR, Respondents.	

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Statement.

This is a consolidation of two actions involving the validity of a so-called stock employees' plan of The Ameri-

can Tobacco Company, whereunder 312,968 shares of the company's common stock B were set aside for sale to employees; of which 56,712 shares have actually been sold, approximately three-fifths to the directors themselves and two-fifths to 521 other higher employees of the company and 5 others at $25 a share, when the stock had a current market value of $112 a share.

The first action was instituted in the Supreme Court of the County of New York by the petitioner, a citizen of New York, against The American Tobacco Company, T. R. Taylor and certain other directors of the Tobacco Company (fol. 3), to cancel the stock issued, to enjoin the issue of further stock, and to hold the directors responsible for attempting to carry out an alleged illegal transaction. This action was removed to the United States District Court for the Southern District of New York March 9, 1931, by the defendants The American Tobacco Company and T. R. Taylor, upon the ground that they were citizens of a different State from the plaintiff, and that the cause involved a separable controversy as to them (fol. 4). On April 6, 1931, this action, without objection, was discontinued as to all defendants except The American Tobacco Company and Taylor, the removing defendants (fol. 4). Further facts having been ascertained, including the participation of the Guaranty Trust Company of New York, which was found to be in actual possession of the stock sought to be cancelled, a second action was thereafter instituted by the petitioner in the Supreme Court of New York against Guaranty Trust Company of New York, Junius Parker, George W. Hill, C. F. Neiley, A. C. Mower, V. Riggio, Charles A. Penn, J. B. Harvie, R. J. Boylan, C. S. Keene, J. K. Fletcher and The American Tobacco Company (fol. 5). This action was removed to the United States District Court for the Southern District of New York by The American Tobacco Company and Charles A. Penn, April 25, 1931, upon the ground that they were citizens of different States from the plaintiff, and that the action involved a separable controversy as to them (fol. 6). The defendant Penn subsequently

died. On November 7, 1931, the District Court denied a motion to remand the second action to the State court, and entered an order consolidating the two actions (fols. 6, 7). The amount involved in each action exceeds $3,000.

Thereafter, a motion having been made by the plaintiff in the consolidated cause (1) to strike out the separate defenses in the answers of the appearing defendants on the ground of insufficiency; (2) for a decree on the pleadings for the relief prayed for in the amended complaint; and (3) in the alternative for an injunction *pendente lite* (fols. 10-18); the motion came on to be heard in the District Court December 24, 1931. On February 23, 1932, the District Court, after holding that "the matters raised in the amended complaints involve the internal management of a foreign corporation, to wit, a New Jersey corporation, and present questions for construction of New Jersey statutes," dismissed each of the bills of complaint "in the exercise of its discretion" without prejudice to the enforcement of the rights of the plaintiff, if any, in the courts of New Jersey (fol. 841). An appeal was taken by petitioner from this decree to the Circuit Court of Appeals for the Second Circuit. The appeal was argued therein May 2nd and 3rd, 1932, and on June 3rd the decree of the District Court was affirmed, Manton, P. J., and Chase, J., voting for affirmance and Swan, J., dissenting. Reference is made to the opinion of the District Court (Rec. p. 273), to the opinion of the majority of the Circuit Court of Appeals (p. 287), and to the dissenting opinion of Swan, J. (p. 297).

Because of the failure to obtain service of some of the defendants and the death of another, as appears above, the only parties now before the Court on this petition are Guaranty Trust Company of New York, Junius Parker, George W. Hill, Vincent Riggio, R. J. Boylan, T. R. Taylor and The American Tobacco Company.

The detailed facts set up in the amended complaint were ascertained as the result of an examination of the defendant's books, allowed by an order of the Supreme Court of New York County, *In re Rogers* v. *American Tobacco Co.*,

143 Misc. Rep. 306, affirmed by the Appellate Division of the Supreme Court, and appeal denied by the Court of Appeals of New York. Only the conclusions drawn by the pleader therefrom were denied by the answers. The case was therefore fully presented by the pleadings.

Facts.

The essential facts were as follows:

On June 25, 1930, the board of directors of The American Tobacco Company, all of whom were interested parties, passed resolutions (1) approving a reduction in the par value of the common and common stock B of the company from $50 to $25 per share, the issue of two shares of the new stock for one share of the old, and an increase in the authorized common stock to 2,000,000 shares and the authorized common stock B to 4,000,000 shares;* and (2) advising the approval by the stockholders of an employees' stock subscription plan pursuant to Chap. 175, L. 1920, State of New Jersey, Smith on N. J. Corp. Law (p. 120).

The material parts of this statute are as follows:

> "1. Any stock corporation formed under any law of this state may, upon such terms and conditions as may be determined in the manner hereinafter designated, provide and carry out a plan or plans for any or all of the following purposes:
>
> (a) The issue or the purchase and sale of its capital stock to any or all of its employees and those actively engaged in the conduct of its business or to trustees on their behalf and the payment for such stock in installments or at one time with or without the right to vote thereon pending payment therefor in full, and for aiding any such employees and said other persons in paying for such stock by contributions, compensation for services, or otherwise.
>
> * * * * * * *

* Note: The common stock and common stock B have the same financial rights; the common stock alone electing directors.

> 2. (b) Where the corporation has been formed without the said charter or by-law provisions [i. e., without appropriate charter provisions as here] the board of directors shall first formulate such plan or plans and pass a resolution declaring that in its opinion the adoption thereof is *advisable*, and shall call a meeting of the stockholders to take action thereon. * * *
>
> 3. Any plan adopted as aforesaid may be recalled, abolished, revised, amended, altered or changed in the same manner as is herein provided for its adoption; * * *
>
> 4. The privileges and powers conferred by this act shall be deemed to be in addition to and independent of any and all powers and authority conferred by any other law or laws, and not in restriction or limitation of any of the powers now permitted to corporations of this state. (L. 1920, C. 175.)"

The plan advised by the directors, and submitted for the stockholders' approval, provided (fol. 139):

That its purpose was to accord to such employees of The American Tobacco Company as may be selected as therein provided, by way of additional compensation for *services to be rendered* an opportunity to purchase shares of stock of the company. The manner of executing the plan was stated to be that the board of directors may at such times as it may determine by way of additional compensation for services to be rendered, offer and allot such stock for subscription to employees in such amounts to such persons, at such prices not less than the par value of the shares allotted payable in full or in instalments, "all as shall be determined with respect to each offering of stock to each individual pursuant to authority to be granted by the board of directors to the President for such purpose." It was further provided (fol. 145) that no employee shall be deemed ineligible to the benefits of the plan by reason of being also a director of the company. Finally, it was stated that the plan may be recalled or amended as provided by Sec. 3 of the law above cited.

At the stockholders' meeting called for July 28, 1930, more than two-thirds of the stockholders present voted approval of the foregoing resolutions. Petitioner's stock was voted against both resolutions; and a protest was read in his behalf which is set out in par. 10 of the complaint (fol. 43).

Under the resolutions thus adopted, 312,968 shares of common stock B were made available for sale to employees, including directors (fol. 47); every director, with one possible exception, being likewise an employee of the company (fol. 298).

Thereafter, on January 28, 1931, the directors of the company met in New York City and approved a sale at $25 a share of 56,712 shares of common stock B on the recommendation of the president as follows (fols. 68, 69):

	Shares
To the president himself	13,440
To other directors	19,330
To 521 other managers and higher employees	22,162
To others grouped by the company under the head "Miscellaneous" (fols. 66, 458) and not employees in the strict sense, as follows:	
One of the trustees	400
A member of the firm's counsel	980
The company's advertising agent	250
Two others	150
	56,712

No stock was allotted to any employee of lower rank than factory sub-assistant (fol. 298).

Every member of the board of directors present at this meeting participated in the allotment at $25 a share; each director present being recorded as voting upon the allotments to all other directors, but as not voting on his own particular allotment (fols. 70, 71).

On the day the stock was thus sold at $25 a share it had a market value of $112 a share (fol. 48).

The procedure adopted by the directors for carrying out the foregoing distribution of stock was as follows:

The stock was sold in the first instance for $25 a share cash to the Guaranty Trust Company, which was authorized as trustee to borrow from itself as an individual the requisite funds. The Guaranty Trust Company then allowed the individuals selected by the president of the Tobacco Company and its directors to subscribe for their several allotments at the same price, it being stated in the agreement that this was by the way of additional compensation for services to be rendered between the date of the agreement, January 31, 1931, and December 31, 1931 (fol. 329). Until December 31, 1931, no subscriber could take up his stock (fol. 337). Payments were to be made on the purchase price from time to time, corresponding to the amount and date of the regular quarterly dividend of $1.25 for each quarter (fol. 335). If any subscriber severed his connection with the company prior to December 31, 1931, it was left to the *trustees* to say whether he should have his allotment or not (fols. 343, 349).

The grounds upon which the invalidity of the foregoing transactions is predicated sufficiently appear from the following

Reasons for Allowance of the Writ.

1. The plan, inasmuch as it left everything to the president "pursuant to authority to be granted by the Board of Directors for such purpose," was not a definite or formulated plan, such as Chap. 175, L. of New Jersey, 1920, required.

The decision of the majority of the Circuit Court of Appeals to the contrary is believed to be in conflict with a statute of the State of New Jersey in an important matter of local law.

2. The stock was sold by directors, the larger part to themselves, at $87 a share less than its then market value. The majority of the Circuit Court of Appeals holds that this was not waste, upon the ground that "the selling price

of the stock on the market (which is always subject to fluctuation) will not justify an allegation of insufficient consideration amounting to fraud"; and that "the corporation received what those in charge of its internal affairs deemed to be sufficient as its par value" (p. 295).

This decision is believed to be untenable and in conflict with the weight of authority on an important matter of general law.

3. In construing Chap. 175, L. of 1920, as authorizing a sale of unissued stock in disregard of the stockholders' pre-emptive rights—a right recognized by the charter, common and statute law of New Jersey, and never taken away from petitioner by an amendment of the charter—the Circuit Court of Appeals gave effect to a State statute violating petitioner's charter contract, contrary to Article 1, Section 10, of the Federal Constitution.

This point was raised in the pleadings (fols. 58-60) and specifically presented by petitioner's briefs in the District Court and the Circuit Court of Appeals.

This decision is believed to be in conflict with the applicable decisions of New Jersey and of this Court, as well.

4. Under the charter of the company (fol. 161), the assets of the company can be used for two purposes only, (1) to put into a reserve fund to be applied to the acquisition of property, and (2) to declare dividends. In New Jersey the charter constitutes a contract of the shareholders *inter sese* which may not be changed by subsequent legislation, notwithstanding a reserved power to amend. The decision of the Circuit Court of Appeals gives effect to Chap. 175, L. 1920, in violation of this contract right, contrary to Article 1, Section 10, of the Federal Constitution.

This question was raised by petitioner's brief in the Circuit Court of Appeals.

5. The majority of the Circuit Court of Appeals held that the complaint should be dismissed for failure to com-

ply with Equity Rule 27 on the ground that plaintiff did not attempt to secure repeal of the plan by action of the shareholders.

This decision is believed to be contrary (1) to the express terms of Chap. 175, N. J. L. 1920, under which the plan was adopted; and (2) to the decisions of this Court on an important question of both local and general law.

6. The plan called for a sale of stock to employees for services "to be rendered." As the directors carried it out, the sale at $25 a share of stock worth $112 a share, was also said to be "by way of additional compensation for services to be rendered to the company to and including December 31, 1931 (fol. 329), i. e., from January 28th to December 31st, 1931. But Chap. 175, L. 1920, does not provide for a sale of stock to employees by way of compensation for services "to be rendered," and upon the contrary the general corporation law of New Jersey (L. 1917, Chap. 195, Sec. 1, Smith on N. J. Corporations, p. 110) provides only that a New Jersey corporation "may issue stock * * * for the amount it actually pays for *labor performed.*"

The decision of the Circuit Court of Appeals in upholding "services to be rendered" as a valid consideration in whole or in part for the stock issue is believed to be contrary to the New Jersey statutes on an important matter of local law.

7. The decision of the Circuit Court of Appeals in effect holds that in asking the stockholders' approval of the stock plan of 1930, the directors were under no duty to disclose the many other stock plans they had secretly put into effect without the stockholders' knowledge, from which they had largely profited, and the other benefits which the officers and employees were then receiving without the stockholders' knowledge.

This decision is believed contrary to the decisions of New Jersey, and in conflict with the weight of authority on an important question of general law.

8. The preliminary resolution of the directors, required under the statute, "advising the adoption of the plan," and the subsequent resolutions of the directors distributing the stock, largely to themselves, at so great an undervaluation, were invalid because not passed by a quorum of disinterested directors. The decision of the Circuit Court of Appeals disregarding this principle is believed untenable and in conflict with the weight of authority upon an important question of general law.

9. The judgment of the Circuit Court of Appeals, although the opinion considers the merits, affirms the judgment of the District Court declining to exercise an admitted jurisdiction in a case where jurisdiction is founded upon both diverse citizenship and the existence of a federal question. The decision of the majority of the Court in this regard is believed to be contrary to the rule laid down by this Court in *Suydam* v. *Broadnax*, 14 Pet. 67, 75; and *Hyde* v. *Stone*, 20 How. 170, 175, that "the courts of the United States are bound to proceed to judgment and afford redress to suitors before them in every case to which their jurisdiction extends. They cannot abdicate their authority or duty in any case in favor of another jurisdiction."

The decision, apart from this principle, is likewise in conflict with the decision of the Circuit Court of Appeals in the Seventh Circuit in the case of *Williamson* v. *Missouri-Kansas Pipe Line Co.*, rendered February 29, 1932, 56 Fed. (2nd) 503, where in a similar situation the Circuit Court of Appeals held that the District Court must take jurisdiction.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari issue to review the decree entered in the United States Circuit Court of Appeals for the Second Circuit in the above-mentioned consolidated action, entitled in said Court "Richard Reid Rogers, Plaintiff-Appellant, against Guaranty Trust Company of New York, Junius Parker, George W. Hill, C. F. Neiley, A. C. Mower, Vincent

Riggio, Charles A. Penn, J. B. Harvie, R. J. Boylan, C. S. Keene, J. K. Fletcher and The American Tobacco Company, Defendants-Appellees; Richard Reid Rogers, Plaintiff-Appellant, against The American Tobacco Company and T. R. Taylor, Defendants-Appellees; Consolidated Cause."

Respectfully submitted,

RICHARD REID ROGERS,
Petitioner.

Supreme Court of the United States

OCTOBER TERM, 1932.

No. .

RICHARD REID ROGERS, Petitioner, against GUARANTY TRUST COMPANY OF NEW YORK, JUNIUS PARKER, GEORGE W. HILL, C. F. NEILEY, A. C. MOWER, VINCENT RIGGIO, CHARLES A. PENN, J. B. HARVIE, R. J. BOYLAN, C. S. KEENE, J. K. FLETCHER and THE AMERICAN TOBACCO COMPANY, Respondents.	Consolidated Cause.
RICHARD REID ROGERS, Petitioner, against THE AMERICAN TOBACCO COMPANY and T. R. TAYLOR, Respondents.	

BRIEF IN SUPPORT OF APPLICATION FOR WRIT.

REASON 1.

Failure of Plan to Conform to Statute Under Which It Was Issued.

The law (Chap. 175, N. J. L. 1920) required the directors to formulate a plan and pass a resolution that its adoption was "advisable." It in terms provided for the

sale of stock by the company to "any or all of its employees." The words "any or all" in statutes of this character are generally used in a distributive sense, and it would seem that the legislative design was to allow *any* employee in good standing to become a stockholder of the company. The only definite term or condition fixed by the "plan," however, was that the stock should not be sold below par. Everything else, the choice of employees, the amounts allotted to each, the price, terms and conditions, by the express provisions of the "plan," were to be determined by the president pursuant to "authority to be granted" to him by the board of directors (fol. 121). Under this arrangement the president did not confine his selections entirely to employees of the company (fol. 66); and no rank and file employee was allowed to participate; whereas by adopting a formula based on fixed salary and contingent compensation (fol. 300)—in his own case amounting to $1,010,000 for 1930, and in the case of the vice-presidents running from $145,000 to $603,000 for the same year—he and the vice-presidents were enabled to obtain 30,125 shares out of a total of 56,712 (fols. 391, 392) at $87 a share less than the market value.

Under these circumstances, Swan, J., dissenting, was of the opinion that the plan was nothing more than a proposal; that it was not such a formulated plan as the statute contemplated. He says (p. 299):

> "It was a proposal that the stockholders abrogate the discretion which the statute vested in them to approve or disapprove a formulated plan declared by the directors to be advisable, and confer upon the directors and president complete discretion to determine and execute in the future, without further reference to the stockholders, any sort of allotment then thought desirable, provided only that the price to employees who were selected to share in it be not less than the par of the stock. The purpose of the statute was to let the stockholders know with some definiteness—'a formulated plan'—what the directors thought advisable, and to allow the stockholders to approve it, if at least two-thirds

> of them also deemed it advisable. This purpose is completely frustrated if it be sufficient to submit a plan which merely proposes that the directors shall be empowered to allot stock to employees on such terms as they may thereafter please. And the undesirability of transferring to the directors complete discretion as to what plan shall be formulated in the future is particularly apparent where, as here, they are entitled to benefit under the plan. It is aptly illustrated by what in fact happened."

He then refers to the large allotments received by the president and other directors above outlined, as illustrating the undesirabiltiy of transferring to the directors so complete a discretion. Nothing can be added to this argument.

REASON 2.

Waste in Sale of Stock.

The stock amounting to 56,712 shares, as has been stated in petition, was sold by the directors at $87 a share less than its then market value. Of this amount, the president received 13,440 shares, an aggregate profit of $1,169,000; the other directors 19,330 shares, an aggregate profit of $1,681,000. The remainder was sold to higher employees (Exhibit H, p. 131), with the exception of 1,780 shares sold to others ranked as "miscellaneous" and not believed to be employees in the sense of either statute or plan (fols. 66, 458).

This proceeding was justified by the majority of the Circuit Court of Appeals, as heretofore stated, upon the ground that "the selling price of stock on the market (which is always subject to fluctuation) will not justify an allegation of insufficient consideration amounting to fraud. The corporation received what those in charge of its internal affairs deemed to be sufficient as its par value"; that is to say, the directors, who alone in New Jersey have corporate management (Sec. 12, G. C. A.; Smith, p. 192).

It is true that the plan provided that the stock could not be sold for less than its par value; but it did not provide that it should be sold for less than its *actual* value. This not only seems evident from the plan itself; but was the construction placed upon it by the president of the company, when seeking proxies prior to the meeting. In response to a letter revoking the petitioner's proxy, the president wrote on July 1, 1930: "Subscriptions under the plan must be at a minimum but by no means or necessity a maximum price of $25.00 a share" (fol. 149).

The true rule as approved by text writers, the Courts of New Jersey and the decisions of this Court is exactly the contrary of that laid down by the Circuit Court of Appeals.

In *Wardell* v. *Railroad Co.*, 103 U. S. 651, 658, this Court said:

> "A person cannot be a purchaser of property and at the same time the agent of the vendor. The two positions impose different obligations, and their union would at once raise a conflict between interest and duty; and, 'constituted as humanity is, in the majority of cases duty would be overborne in the struggle.' *Marsh* v. *Whitmore*, 21 Wall. 178, 183. The law, therefore, will always condemn the transactions of a party on his own behalf when, in respect to the matter concerned, he is the agent of others, and will relieve against them whenever their enforcement is seasonably resisted. Directors of corporations, and all persons who stand in a fiduciary relation to other parties, and are clothed with power to act for them, are subject to this rule: they are not permitted to occupy a position which will conflict with the interest of parties they represent and are bound to protect. They cannot, as agents or trustees, enter into or authorize contracts on behalf of those for whom they are appointed to act, and then personally participate in the benefits."

The leading case in this Court no doubt is *Michoud* v. *Girod*, 4 How. 503, 556, where this Court laid down the general rule that a purchase by a trustee is fraudulent and void although a fair price be paid. Dealing with the

exception that a purchase by a trustee of his *cestui que trust,* provided that it is deliberately agreed or understood between them that the relation shall be dissolved, and that there is no fraud, concealment or advantage taken by the trustee, will be sustained in a court of equity, this Court went on to say:

> "But it is difficult to make out such a case, where the exception is taken, especially when there is any *inadequacy of price* or any inequality in the bargain."

And quite recently this Court in *United States* v. *Dunn,* 268 U. S. 121, 131, announced the doctrine where a trustee was interested in a sale:

> "It is not necessary in such a situation in order to establish a right for relief to show that the beneficiary was damaged by the fraudulent conduct of the trustee. It is sufficient to establish that the fiduciary has exercised his power of disposition for his own benefit, without more."

In New Jersey the rule is thus expressed:

> "The rule is that contracts made by a board of directors with one of their own number are, regardless of merits, voidable at the option of a dissatisfied stockholder, while such contracts sanctioned by a majority of the stockholders will be set aside by a court if it is disadvantageous to the minority stockholders. Equity will investigate." *Booth* v. *Beattie,* affirmed on opinion below, 95 N. J. Eq. 776.

In *Marr* v. *Marr,* 73 N. J. Eq. 643, 650, it was held by the Court of Errors and Appeals, Pitney, J., writing the opinion, that even where a director purchased corporate property at a sheriff's sale it was a controlling circumstance that the director purchased at *half* the value; and that the true rule is that "such a contract is voidable at the option of the cestui que trust exercised within a reasonable time."

In *Barry* v. *Moeller,* 68 N. J. Eq., at p. 489, it was said by Garrison, J.:

> "In cases where sales of property of the corporation are made to directors, the latter are charged with the full value of the property received, the contract price as fixed by the wrongdoer being completely disregarded."

This rule was declared to be the effect of the decision of the Court of Errors and Appeals in *Wilkinson* v. *Bauerle,* 41 N. J. Eq. 635, 645.

About the only exception to the foregoing rule recognized in this Court is where the trustee lends needed money to his *cestui que trust* and takes security, when he may purchase the property at a fair public sale, to protect himself. *Twin Lick Oil Co.* v. *Marbury,* 91 U. S. 587. But in that case the general doctrine was recognized as follows:

> "That a director of a joint-stock corporation occupies one of those fiduciary relations where his dealings with the subject-matter of his trust or agency, and with the beneficiary or party whose interest is confided to his care, is viewed with jealousy by the courts, and may be set aside on *slight* grounds, is a doctrine founded on the soundest morality, and which has received the clearest recognition in this court and in others."

The text writers are to the same purport: Spellman on Directors, Sec. 232; Cook on Corporations, Sec. 653.

To permit a rule to be established in the highest Federal Court in so important a commercial community as New York, to the effect that directors may sell stock to themselves or any others at one-fifth of its market value because stock has a fluctuating value, or because that is a matter of internal control, will imperil, it is believed, the rights of stockholders everywhere.

REASON 3.

The Unconstitutional Invasion of Petitioner's Pre-emptive Right to Subscribe to Unissued Stock by Giving Effect to a Later Legislative Act of the State of New Jersey (Chapter 175, Laws 1920).

The pre-emptive right of stockholders to subscribe to new stock was said by this Court in *Miles* v. *Safe Deposit Co.*, 259 U. S. 247, 252, to be so universally recognized as to have become "axiomatic in American corporation law."

It has always been fully recognized in New Jersey: *Way* v. *American Grease Co.*, 60 N. J. Eq. 263; *Wall* v. *Utah Copper Co.*, 70 N. J. Eq. 17; *Morganstern* v. *American Milling Co.*, 87 N. J. Eq. 358; *Graussman* v. *Porto Rico Am. Tob. Co.*, 95 N. J. Eq. 155, 165. In the latter case it was said: "the right of the present stockholders to have a first call upon the new stock cannot be defeated by any corrupt or other plan of the directors." In *Borg* v. *International Silver Co.*, 11 Fed. (2nd) 147, 151, opinion by Learned Hand, J., it was said: "To deprive them (the stockholders) of their right of pre-emption is to change their contract."

This rule, long recognized as a part of the common law of New Jersey, was crystallized into statute law by the Act of 1926, passed six years after the employees' aid act of 1920, and before the program of 1930 was initiated. This law (Smith, Vol. 2, p. 80) reads as follows:

> "Upon the issue of capital stock for cash, unless otherwise expressly provided in the certificate of incorporation, or in by-laws adopted by two-thirds in interest of each class of stockholders, every stockholder shall have a right (unless waived by him) according to the number of shares held by him to purchase his pro rata proportion of the stock to be issued, at such price (which may be in excess of the par value), within such time and on such terms as shall be fixed and determined by the board of di-

rectors; provided, that unless otherwise expressly provided in the certificate of incorporation, or by-laws adopted by two-thirds in interest of each class of stockholders, a holder of preferred or special stock entitled to limited preferential dividends and to a fixed sum upon any distribution of the assets of the corporation shall have and be entitled to exercise such pre-emptive rights only in case of the issue of stock of the same class held by him or of any class which has preference or priority as to assets or dividends over the class of stock held by him. In any such case the board of directors shall have power to determine what disposition shall be made of any stock to be issued and which shall not be subscribed for by stockholders. (G. C. A. Sec. 124, as added by L. 1926, C. 318, Sec. 16.)"

Inasmuch as neither by the charter nor any by-law had this pre-emptive right been surrendered by the stockholders, it could be taken away, if at all, only by an amendment of the charter approved by two-thirds of the stockholders of all classes outstanding. Under a familiar principle of statutory construction, that statutes must be reconciled (*McKee* v. *United States,* 8 Wall. 163, 167), the Act of 1920 should be confined to those corporations which either by the original charter, or possibly an amendment thereof, have cancelled this pre-emptive right.

The majority of the Circuit Court of Appeals attempted to meet this objection by the statement that the statutory right of pre-emption applied only for an issue and sale of the stock for "cash" (p. 295).

The stock, however, *was* issued for cash, if this be the important consideration. It was sold immediately to the Guaranty Trust Company, not even an employee, at $25 a share; and was reoffered to the directors and selected list of officers by the Guaranty Trust Company at the same price (fols. 62, 268). The Act of 1920, under which the plan was passed, does not provide for a sale for other than cash, although it authorizes the purchase price to be paid in instalments, and for company aid in paying for it.

There is even a further fundamental question of contract right involved. Under the decisions of New Jersey, the charter is a contract between the shareholders *inter sese* which may not be changed by subsequent legislation, notwithstanding a reserved power to amend (*Kean* v. *Johnson*, 9 Eq. 401; *Zabriskie* v. *Hackensack Ry. Co.*, 18 Eq. 178, 191, 192; *Black* v. *Del. & Rar. Canal Co.*, 24 Eq. 456; *Mills* v. *The Central R. R.*, 41 Eq. 1; *Loewenthal* v. *Rubber Co.*, 52 Eq. 440, 441; *German Ins. Co.* v. *Schwarzwaelder*, 59 Eq. 589; *Re Newark Library Assn.*, 64 N. J. L. 217, 219; *Einstein* v. *Raritan Woolen Mills*, 74 Eq. 624, 629; *Itiso* v. *Met. Sav. & Loan Co.*, 68 N. J. L. 588, 590; *Colgate* v. *U. S. Leather Co.*, 75 Eq. 229; *Riker* v. *United Drug Co.*, 79 Eq. 580, 583.

If this be so, the pre-emptive right, without the stockholders' consent, could not be taken away even under the Act of 1926; certainly not under the Act of 1920. This contract right seems to be recognized in the recent case of *Scott* v. *Lorillard Co.*, 108 N. J. Eq. 153, aff'd by the Court of Errors and Appeals, 109 N. J. Eq. 417, where the case proceeded upon the assumption that under the employees' stock plan in that case, it was essential that the stockholders waive their pre-emptive rights.

The question here presented involves a substantial constitutional right upon which it is respectfully submitted petitioner is entitled to be heard.

REASON 4.

Disposition of Corporate Assets Contrary to Charter.

The charter contained the following provision:

> "The directors of said merged corporation shall have the power to fix and determine from time to time and to vary the sum to be reserved, over and above its capital stock paid in, as a working capital, before declaring any dividends among its stockholders; and to direct and determine the use and disposition of any surplus or net profits or earnings,

> over and above the capital stock paid in. All sums so reserved may be applied from time to time to the acquisition of property as the directors shall from time to time determine" (fol. 160).

It is the petitioner's contention that under this provision the assets of the company could be applied only (1) to put in a reserve fund to acquire property as directed by the board, or (2) to payment of dividends.

The law of New Jersey is thus stated by the highest Court of the State in *Riker* v. *United Drug Co.*, 79 N. J. Eq. 580, 583:

> "Each stockholder of the company owns a share in its property and assets, and is entitled to have a proportionate share in its profits. They have invested their capital in it, and in it alone, and they are entitled to every dollar that it earns. This is the agreement of the stockholders among themselves. They each contract with the others that their money shall be employed for the purposes specified in the certificate of incorporation, and for no other purpose, and that the profits of the enterprise shall be ratably apportioned among them. In the absence of legislation permitting a variation of the provisions of this fundamental contract, by vote of a majority of the stockholders, no majority, however large, has the right to divert any part of the joint capital, however small, to any purpose not consistent with and growing out of this original, fundamental agreement" (citing *Black* v. *Del. & Raritan Canal Co.*, 24 N. J. Eq. 456, 463; *Mills* v. *Central Railroad Co.*, 41 Eq. 1; *Colgate* v. *U. S. Leather*, 75 Eq. 229).

The rule laid down in *Dodge* v. *Woolsey*, 18 How. 331, 341, 342, is to the same effect, where the following rule was approved:

> "It is a breach of trust towards a shareholder in a joint-stock incorporated company, established for certain definite purposes prescribed by its charter, if the funds or credit of the company are, without

> his consent, diverted from such purpose, though the misapplication be sanctioned by the votes of the majority; and, therefore, he may file a bill in equity against the company in his own behalf, to restrain the company by injunction from any such diversion or misapplication."

It can hardly be disputed that a sale of 56,712 shares of the company's capital stock at nearly $5,000,000 less than its then value is a dissipation of corporate assets. Inasmuch as the charter did not authorize such use of corporate property; and inasmuch as the authorities cited under Reason 3 show that the charter constitutes in New Jersey a contract between the shareholders *inter sese* not subject to alteration by a later legislative act, even under a reserved power to amend, it is submitted that the decision of the Circuit Court of Appeals allowing this to be done under cover of a later statute raises a fair question of invasion of constitutional rights upon which petitioner is entitled to be heard.

REASON 5.

Alleged Failure to Comply with Rule 27.

The majority opinion (p. 296) holds that petitioner is barred because of failure to combine with two other stockholders and call a meeting to cancel the employees' stock plan under Sec. 46 of the General Corporation Act of New Jersey (Chap. 185, L. 1896; Smith, p. 228), which provides that three or more stockholders of a New Jersey corporation may call a stockholders' meeting. To say nothing of the prohibitive cost and practical impossibility of petitioner's calling a meeting of stockholders of so large a company, it is submitted that this decision (1) disregards the actual situation here presented, and (2) violated the reason of Rule 27.

The dissenting opinion of Swan, J. (p. 301) deals fully with this question. The petitioner will, therefore,

only briefly summarize the reasons why under the facts of this case Rule 27 had no application.

First, the plan is claimed to be illegal. If so, there is nothing to repeal.

Second, if, however, the plan were legal, it was wastefully carried out, and in a manner contrary to the plan itself. Evidently in this latter aspect the plan does not require repeal.

Third, the plan itself requires any repeal or modification to be carried out under the provisions of Chap. 175, L. 1920. This act in turn requires the repeal to be effected in the same manner as the plan is originally passed, i. e., as a condition precedent to a stockholders' meeting the board of directors must first pass a resolution "advising" repeal. As the board of directors are all pecuniarily interested, have all participated in the benefits of the plan, have declined to sue on written demand, and have actively defended this action, relief through this channel is obviously impossible.

In *Hawes* v. *Oakland*, 104 U. S. 450, 461, out of which Rule 27 grew, an appeal to stockholders was said to be unnecessary where "it was not *reasonable* to require it." In the leading case of *Del. & Hud.* v. *Al. & Susquehanna R. R. Co.*, 213 U. S. 435, 440, 452, it was said the rule "is intended to have a *practical* operation, and to have that it must, as to its requirements, be given such play as to fit the conditions of different cases." The rule itself provides for an appeal to stockholders only where *"necessary."*

With the vast increase in the size of the corporations in this country it must be increasingly evident that an appeal to stockholders by a single stockholder to overthrow a seated management is a futile remedy (see op. Swan, J., p. 300). Such a requirement would effectually amount to a denial of justice in many cases, and give to Rule 27 that impractical application which this Court has condemned. In the case at bar, however, for the reasons stated Rule 27 had no application.

REASON 6.

The Sale of Stock to Employees for Services "to be Rendered."

It will be observed that the plan provides for a sale of stock to employees "by way of compensation for services to be rendered." In the agreement with the Guaranty Trust Company the sale of stock at $87 a share less than value, was also stated to be by way of "compensation for services to be rendered" for the remainder of the year (fol. 329). Evidently this was merely a legal device designed to import consideration into a transaction which was recognized as lacking of adequate consideration. It should be borne in mind that the president was already receiving $1,010,000 a year in salary and bonus; the senior vice-president $603,000 and the other vice-presidents from $459,000 to $555,000 (fols. 74-76); and it was altogether unlikely that this additional consideration was necessary to retain their services for a further period of eleven months.

Chap. 175, L. 1920, does not authorize stock to be sold to employees "by way of compensation for additional services to be rendered," as the plan itself and its execution endeavored to provide; and upon the other hand the General Corporation Act authorizes stock to be issued only "for labor performed" (G. C. A., Sec. 46; Smith, p. 228).

REASON 7.

Duty to Disclose.

In the official circular sent out with the notice of meeting to the stockholders soliciting their proxies to vote for the plan, the following statement was made by the president (fols. 114, 115):

> "I am certain that every stockholder will agree that it is to the company's interest that the or-

> ganization which has made possible the great success which the Company has enjoyed during the past few years should be given every encouragement to continue in the Company's employ. It is the purpose of this plan, conforming with the policies of many large business enterprises, to offer inducements by way of stock ownership in the Company to the men who have made that success possible, so that the Company and its stockholders will have the assurance of their continued services in carrying the business forward with maximum enthusiasm and efficiency."

From this language the stockholders would naturally infer that no other employees' stock plan had ever been put out by the company.

It appears, however, from the allegations of the complaint (par. 21, fols. 76-78, 95-98), not denied (fol. 587), that the directors had already put into effect without the knowledge or approval of the stockholders (compl., fol. 101; par. XIX, ans., fol. 591), between the years 1914 and October, 1929, numerous preferred stock plans and two common stock plans from which the employees as a whole and the directors had largely profited. Towards these various plans the company from the year 1914 as its contribution had set aside the sum of $240,000 a year (fols. 95, 96). The first preferred stock plans were confined to employees drawing salaries under $3,500 a year; but in the plans commencing in 1921, the salary limit was removed and the directors participated. There were also two common stock plans. In the first, put into effect in 1926, the company bought 21,500 shares of its old $50 par value stock, and sold it at cost chiefly to the directors, the president taking 8,000 shares and seven other officers, all of whom but one were directors, from 250 to 5,000 shares each. The company illegally was forced to guarantee the payment of the directors' notes issued to pay for this stock and negotiated with banks in New York City (fol. 77). In the second common stock plan, put into effect in 1929, 51,750 shares of the old stock (equivalent to twice as

many shares of the present stock), under the president's direction, without any previous authority from the board, were acquired by the company at $172 a share; and of this amount 46,500 shares were thereafter sold by the directors to themselves at that price at a time when, as their own resolution states (fol. 477), the stock was worth approximately $222 a share, or $50 a share more than they undertook to pay. Moreover, by a series of devious devices set up in sub-sections (e) and (f) of paragraph 21 of the complaint (fols. 87-101), $469,387.23 in 1929 and $917,625.96 in the year 1930 were misappropriated from the company's funds and applied in part payment of this stock.

In addition, the employees as a whole were receiving free medical services; and pensions costing the company $160,000 per annum (fols. 73, 74).

In addition, the president was receiving for the year 1930 a fixed salary of $168,000, and profit sharing for that year in the amount of $842,000 additional; the senior vice-president a fixed salary of $98,000, and profit sharing of $505,000; and the other vice-presidents fixed salaries of $50,000 each and profit sharings of from $409,000 to $505,000 (fols. 74-76). All these facts were unknown to petitioner and were not disclosed to the stockholders.

The suppression of these facts it is believed constituted unfair dealing with the stockholders going to the very root of the entire transaction and invalidating the stock plan *ab initio*. Certainly, the duty to have disclosed these facts is settled by definite authority; and no authority to the contrary has been discovered.

As said in *General Investment Co.* v. *Am. Hide & Leather Co.*, 97 N. J. Eq., 214, 235:

> "No one can say in advance what the effect would have been upon the sentiment of any stockholder had he known all that he was entitled to know."

The reason for the rule is thus stated (p. 233):

> "Any other rule would permit the most ruthless destruction of the rights of the stockholders. Adroit

> management could frequently prepare a scheme in such innocent guise that ordinary stockholders would not be put upon their guard unless the full discharge of their duties by directors or officers presented the objectionable information which might cause individual stockholders to more carefully scan the proposed plan, and seek competent advice. Furthermore, if the law is to remain a scientific co-ordinated body of principles, doctrines and rules, there is no reason that fiduciary agents, such as directors, should not be subjected to the underlying directions of the law pertaining to trustees, which they are *sub modo*. There is no better rule established than that 'a trustee is bound to communicate to his beneficiary any knowledge or information he may have obtained affecting the beneficiary's interests, so far as they are embraced in or depend upon the trust or confidential relations.' "

In this very case on the application for an examination of the books, the Supreme Court, Townley, J., said:

> "Another reason urged why the order should not be granted is the anomalous one that if a board of directors has done its duty as well as the present directors of The American Tobacco Company have performed theirs, a stockholder may not inquire into any plans they may have to benefit employees, considering themselves as employees. It is sufficient answer that the directors are nevertheless, regardless of the magnitude of their success, in the strictest fiduciary relation to the stockholders and must make a full disclosure of what profits they would make out of any scheme submitted by them for the approval of the company."
>
> *Matter of Rogers* v. *Amer. Tobacco Co.*, 143 Misc. Rep. 306, 309.

The opinion in the District Court (fol. 824) disposed of this point by the statement that "the plaintiff asks for no relief in this suit as to these matters." Actually the relief sought was the cancellation of the stock sale plan of 1930-1931 by reason of the deception thus practiced on the stockholders.

REASON 8.

Disqualification of Directors by Reason of Personal Interest to Constitute a Quorum for Passage of the Various Resolutions.

Chap. 175, L. 1920, required as a condition of submission to the stockholders a resolution of the board of directors declaring that in its opinion the adoption of the plan was "advisable."

In determining what was "advisable," the directors could not be influenced by their personal interests. That was an abuse of the authority given them, which Pitney, J., in *Barrett* v. *Bloomfield,* 64 N. J. Eq. 425, 441, 445, declared rendered the whole transaction void or voidable and subject to review by the courts. The directors were, therefore, disqualified to pass the original resolution advising the plan, inasmuch as they qualified themselves as beneficiaries thereunder and actually thereafter participated in the benefits.

Much less were they entitled to be counted for the purpose of making a quorum to pass the resolutions of January 28, 1931, distributing the stock at a price so greatly beneath its value. The fact that each director was recorded as not voting on his own particular allotment is of no significance when it appears that each director voted for the allotments to all others. In such a case it has been expressly held that voting "in rotation" has the same effect as voting directly (*McNab* v. *McNab & Harlin Mfg. Co.,* 62 Hun 18, 22; aff'd 133 N. Y. 687).

The law on this subject is settled by an overwhelming weight of authority, but the decision of the Circuit Court of Appeals completely disregards it.

In *Thompson on Corporations,* Sec. 1257, it is said that "the cases are practically unanimous upon the proposition that a director who is personally interested in a proposition, or as to any matter pending before the board, is disqualified from acting, *and cannot be counted in estimating the quorum.*"

In *Spellman on Corporate Directors,* Sec. 179, it is said that the rule is established "by an overwhelming weight of authority."

The doctrine is firmly established in New Jersey (*Van Hook* v. *Somerville Mfg. Co.,* 5 N. J. Eq. 137, 169; *Wall* v. *Utah Copper Co.,* 70 N. J. Eq. 17, 26; *Met. T. & T. Co.* v. *Domestic T. & T. Co.,* 44 N. J. Eq. 568, 573). In *Enright* v. *Hecksher,* 240 Fed. 863, 872 (C. C. A., 2nd Cir.), Rogers, J., writing the opinion, it was said:

> "A director, whose interest in a matter disqualifies him from voting upon a resolution concerning it, cannot, according to the better opinion, be counted when the vote is taken. A director so disqualified by personal interest loses, *pro hac vice,* his character as a director, and so cannot be counted. *That is the law of New Jersey.*"

REASON 9.

The District Court Could Not in Its Discretion Decline to Exercise an Admitted Jurisdiction.

The case is in the Federal Court by reason of diverse citizenship. There is also involved a federal question, viz.: the violation of petitioner's charter contract, by the construction placed by the Circuit Court of Appeals upon Chap. 175, N. J. L. of 1920. Under either aspect, the District Court could not decline jurisdiction. Although the Circuit Court of Appeals considered the case upon the merits, the order simply affirms the judgment below dismissing the case for jurisdictional reasons. As appears from the dissenting opinion of Swan, J., the jurisdictional question was thus necessarily involved (p. 301). The reasons why the District Court was bound to take jurisdiction were thus expressed in *Suydam* v. *Broadnax,* 14 Pet. 67, 75:

> "The 11th section of the act to establish the judicial courts of the United States carries out the

constitutional right of a citizen of one State to sue a citizen of another State in the circuit court of the United States, and gives the circuit court 'original cognizance, concurrent with the courts of the several states, of all suits of a civil nature, at common law, and in equity,' &c., &c. It was certainly intended to give to suitors, having a right to sue in the circuit court, remedies coextensive with these rights."

In *Hyde* v. *Stone,* 20 How. 170, 175, it was said that the federal courts are bound to afford redress to suitors in every case to which their jurisdiction extends.

"They cannot abdicate their authority or duty in any case in favor of another jurisdiction."

See likewise *Chicot* v. *Sherwood,* 148 U. S. 529, 534; *McClellan* v. *Carland,* 217 U. S. 268, 281, 282; *Kline* v. *Burke,* 260 U. S. 226, 230.

The decree of the District Court, affirmed by the Court of Appeals, was also in direct conflict with the decision of the Circuit Court of Appeals in the Seventh Circuit in the case of *Williamson* v. *Missouri-Kansas Pipe Line Co.* (decided Feb. 29, 1932), 56 Fed. (2nd) 503, 511.

The undisputed facts are that The American Tobacco Company is licensed to do business under the laws of New York, with its principal place of business in New York City, where its chief executives have their offices, where its board of directors customarily meets, and where its principal records are kept (fol. 30). Only one of the individual defendants is a resident of New Jersey (fols. 4, 5), and the stock sought to be cancelled is in the possession of the Guaranty Trust Company, a New York corporation, which could not be reached in New Jersey. The case is thus brought squarely under the decision in the *Williamson* case, which says:

"Bearing upon the question of expediency, convenience, and power to effectuate a decree in case

one should be rendered, each appellee has all of its books and records, its principal office, most of its business, many of its officers and directors, including its president, and part of its assets within this jurisdiction, and neither is doing any business in Delaware, or maintaining any office in that state except as is necessary under the Laws of Delaware to maintain its corporate existence. Each appellee is licensed to do business in Illinois, and has been served with process in this cause. Under the allegations of the bill we think that considerations of neither justice nor expediency point to the courts of Delaware as the appropriate tribunals to investigate and determine the charges made in the bill as against Parish & Co., and that the District Court has ample power to effectuate any judgment it may render, under the evidence, against Parish & Co. We think the trial court erred in declining to exercise jurisdiction."

Respectfully submitted,

RICHARD REID ROGERS, *pro se*,
EVAN SHELBY,
Of Counsel for Petitioner.

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CHARLES ELMORE

Supreme Court of the United States

OCTOBER TERM, 1932.

No. 227.

Consolidated Cause

RICHARD REID ROGERS,
Plaintiff-Petitioner,

against

GUARANTY TRUST COMPANY OF NEW YORK, JUNIUS PARKER, GEORGE W. HILL, C. F. NEILEY, A. C. MOWER, VINCENT RIGGIO, CHARLES A. PENN, J. B. HARVIE, R. J. BOYLAN, C. S. KEENE, J. K. FLETCHER and THE AMERICAN TOBACCO COMPANY,
Defendants-Respondents.

RICHARD REID ROGERS,
Plaintiff-Petitioner,

against

THE AMERICAN TOBACCO COMPANY and T. R. TAYLOR,
Defendants-Respondents.

BRIEF ON BEHALF OF PLAINTIFF-PETITIONER

RICHARD REID ROGERS,
Petitioner, pro se.

EVAN SHELBY,
of Counsel.

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Equity Rule 27.....8, 33, 34, 35

Supreme Court of the United States

RICHARD REID ROGERS, Plaintiff-Petitioner, against GUARANTY TRUST COMPANY OF NEW YORK, JUNIUS PARKER, GEORGE W. HILL, C. F. NEILEY, A. C. MOWER, VINCENT RIGGIO, CHARLES A. PENN, J. B. HARVIE, R. J. BOYLAN, C. S. KEENE, J. K. FLETCHER and THE AMERICAN TOBACCO COMPANY, Defendants-Respondents.	Consolidated Cause.
RICHARD REID ROGERS, Plaintiff-Petitioner, against THE AMERICAN TOBACCO COMPANY and T. R. TAYLOR, Defendants-Respondents.	

BRIEF ON BEHALF OF PLAINTIFF-PETITIONER.

This is a consolidated cause involving: (1) the original validity of a so-called stock employees' plan of The American Tobacco Company, whereby 312,968 shares of the company's common stock B were set aside for sale to such employees as might be designated by the president pursuant to authority to be granted him by the board of directors; and (2) the validity of the partial execution of the plan, whereby 56,712 shares were subsequently sold chiefly to directors at $87 a share less than its then market value.

Status of Litigation.

There were two actions: the first was instituted in the Supreme Court of New York County by plaintiff, a stockholder and citizen of New York, against The American Tobacco Company, T. R. Taylor and other directors of the Tobacco Company (Rec. p. 1), to cancel the stock issued, to enjoin the issue of further stock, and to hold the directors responsible for attempting to carry out an alleged illegal transaction. This action was removed to the United States District Court for the Southern District of New York March 9, 1931, by the defendants The American Tobacco Company and T. R. Taylor, upon the ground that they were citizens of a different State from the plaintiff, to wit, New Jersey, and that the cause involved a separable controversy as to them (p. 2). On April 6, 1931, this action, without objection, was discontinued as to all defendants except The American Tobacco Company and Taylor, the removing defendants (p. 2). Further facts having been ascertained, including the participation by the Guaranty Trust Company of New York, which was found to be in actual possession of the stock sought to be cancelled, a second action was begun by the petitioner in the Supreme Court of New York against the Guaranty Trust Company of New York, Junius Parker, George W. Hill, C. F. Neiley, A. C. Mower, V. Riggio, Charles A. Penn, J. B. Harvie, R. J. Boylan, C. S. Keene, J. K. Fletcher and The American Tobacco Company (p. 2). This action was removed to the United States District Court for the Southern District of New York by The American Tobacco Company and Charles A. Penn, April 25, 1931, upon the ground that they were citizens of different States from the plaintiff and that the action involved a separable controversy as to them (p. 2). The defendant Penn subsequently died. On November 7, 1931, the District Court denied a motion to remand the second action to the State court (53 Fed., 2nd, 398), and entered an order consolidating the two actions (p. 3). The amount involved in each action exceeds $3,000.

Thereafter, a motion having been made by the plaintiff in the consolidated cause: (1) to strike out the separate defenses in the answers of the appearing defendants on the ground of insufficiency; (2) for a decree on the pleadings for the relief prayed for in the amended complaint; and (3) in the alternative, for an injunction *pendente lite* (p. 4); the motion came on to be heard in the District Court December 24, 1931. On February 23, 1932, the District Court, after holding that "the matters raised in the amended complaints involve the internal management of a foreign corporation, to wit, a New Jersey corporation, and present questions for construction of New Jersey statutes," dismissed each of the bills of complaint "in the exercise of its discretion" without prejudice to the enforcement of the rights of the plaintiff, if any, in the courts of New Jersey (p. 281). An appeal was taken by plaintiff from this decree to the Circuit Court of Appeals for the Second Circuit. On June 3rd the decree of the District Court was affirmed, Manton, P. J., and Chase, J., voting for affirmance and Swan, J., dissenting. Reference is made to the opinion of the District Court (p. 273), to the opinion of the majority of the Circuit Court of Appeals (p. 287), and to the dissenting opinion of Swan, J. (p. 297). The opinion of the District Court will also be found reported in 60 Fed. (2nd) at p. 106; and the opinion of the Circuit Court of Appeals in 60 Fed. (2nd) at p. 114.

Because of the failure to obtain service of some of the defendants and the death of another, as appears above, the only parties now before the Court are the Guaranty Trust Company of New York, Junius Parker, George W. Hill, Vincent Riggio, J. B. Harvie, R. J. Boylan, T. R. Taylor and The American Tobacco Company.

The detailed facts set up in the amended complaint were ascertained as the result of an examination of the Tobacco Company's books, allowed by an order of the Supreme Court of New York County, *In re Rogers* v. *American Tobacco Co.*, 143 Misc. Rep. 306, affirmed by the Appellate Division of the Supreme Court, and appeal denied by the Court of Ap-

peals of New York. Only the conclusions drawn by the pleader therefrom were denied by the answers. The case was, therefore, fully presented by the pleadings.

Facts.

The essential facts were as follows:

On June 25, 1930, the board of directors of The American Tobacco Company, all of whom were interested parties, passed resolutions (1) approving a reduction in the par value of the common and common stock B of the company from $50 to $25 per share, the issue of two shares of the new stock for one share of the old, and an increase in the authorized common stock to 2,000,000 shares and the authorized common stock B to 4,000,000 shares;* and (2) advising the approval by the stockholders of an employees' stock subscription plan pursuant to Chapter 175, Laws of 1920, State of New Jersey, Smith on N. J. Corp. Law, p. 120.

The material parts of this statute are as follows:

> "1. Any stock corporation formed under any law of this state may, upon such terms and conditions as may be determined in the manner hereinafter designated, provide and carry out a plan or plans for any or all of the following purposes:
>
> (a) The issue or the purchase and sale of its capital stock to any or all of its employees and those actively engaged in the conduct of its business or to trustees on their behalf and the payment for such stock in installments or at one time with or without the right to vote thereon pending payment therefor in full, and for aiding any such employees and said other persons in paying for such stock by contributions, compensation for services, or otherwise.
>
> * * * * * * *
>
> 2. (b) Where the corporation has been formed without the said charter or by-law provisions [i. e.,

*Note: The common stock and common stock B have the same financial rights; the common stock alone electing directors.

without appropriate charter provisions as here] the board of directors shall first formulate such plan or plans and pass a resolution declaring that in its opinion the adoption thereof is *advisable,* and shall call a meeting of the stockholders to take action thereon. * * *

3. Any plan adopted as aforesaid may be recalled, abolished, revised, amended, altered or changed in the same manner as is herein provided for its adoption; * * *

4. The privileges and powers conferred by this act shall be deemed to be in addition to and independent of any and all powers and authority conferred by any other law or laws, and not in restriction or limitation of any of the powers now permitted to corporations of this state. (L. 1920, C. 175.)"

The plan advised by the directors, and submitted for the stockholders' approval, provided (p. 47):

That its purpose was to accord to such employees of The American Tobacco Company as may be selected as therein provided, by way of additional compensation for *services to be rendered* an opportunity to purchase shares of stock of the company. The manner of executing the plan was stated to be that the board of directors may, at such times as it may determine by way of additional compensation for services to be rendered, offer and allot such stock for subscription to employees in such amounts, to such persons, at such prices not less than the par value of the shares allotted payable in full or in instalments, "all as shall be determined with respect to each offering of stock to each individual pursuant to authority to be granted by the board of directors to the President for such purpose." It was further provided (p. 49) that no employee shall be deemed ineligible to the benefits of the plan by reason of being also a director of the company. Finally, it was stated that the plan may be recalled or amended as provided by Section 3 of the law above cited.

At the stockholders' meeting called for July 28, 1930, more than two-thirds of the stockholders present voted approval

of the foregoing resolutions. Plaintiff's stock was voted against both resolutions; and a protest was read in his behalf which is set out in paragraph 10 of the complaint (p. 15).

Under the resolutions thus adopted, 312,968 shares of common stock B were made available for sale to employees, including directors (p. 16); every director, with one possible exception, being likewise an employee of the company (p. 100).

Thereafter, on January 28, 1931, the directors of the company met in New York City and approved a sale at $25 a share of 56,712 shares of common stock B on the recommendation of the president as follows (p. 23):

	Shares
To the president himself	13,440
To other directors	19,330
To 521 other managers and higher employees	22,162
To others grouped by the company under the head "Miscellaneous" (p. 153) and not employees in the strict sense, as follows:	
One of the trustees	400
A member of the firm's counsel	980
The company's advertising agent	250
Two others	150
	56,712

No stock was allotted to any employee of lower rank than factory sub-assistant (p. 100).

Every member of the board of directors present at this meeting participated in the allotment at $25 a share; each director present being recorded as voting upon the allotments to all other directors, but as not voting on his own particular allotment (p. 24; Ex. F, p. 79).

On the day the stock was thus sold at $25 a share it had a market value of $112 a share (p. 16).

The procedure adopted by the directors for carrying out the foregoing distribution of stock was as follows:

The stock was sold in the first instance for $25 a share cash to the Guaranty Trust Company, which was authorized

as trustee to borrow from itself as an individual the requisite funds. The Guaranty Trust Company then allowed the individuals selected by the president of the Tobacco Company and its directors to subscribe for their several allotments at the same price, it being stated in the agreement that this was by the way of additional compensation for services to be rendered between the date of the agreement, January 31, 1931, and December 31, 1931 (p. 110). Until December 31, 1931, no subscriber could take up his stock (p. 113). Payments were to be made on the purchase price from time to time, corresponding to the amount and date of the regular quarterly dividend of $1.25 for each quarter (p. 112). If any subscriber severed his connection with the company prior to December 31, 1931, it was left to the *trustees* to say whether he should have his allotment or not (p. 115).

Specification of Errors.

The following errors were specified in the application for writ of certiorari, and are here set out in the order of events:

1. The preliminary resolution of the board of directors required by the statute "advising the adoption of the plan" was not passed by a quorum of disinterested directors, and was therefore of no effect.

2. There was such concealment of important facts which the stockholders were entitled to know, and of intention upon the part of the management, as constituted actual or constructive fraud and invalidated the transaction *ab initio*.

3. The plan submitted, inasmuch as it left everything to the president "pursuant to authority to be granted by the Board of Directors for such purpose," was not a definite or formulated plan such as Chapter 175, Laws of New Jersey, 1920, required.

4. In construing Chapter 175, Laws of 1920, as authorizing a sale of unissued stock in disregard of the stockholders' pre-emptive rights—a right recognized by the charter, com-

mon and statute law of New Jersey, and never taken away from petitioner by an amendment of the charter—the Circuit Court of Appeals gave effect to a State statute violating petitioner's charter contract, contrary to Article 1, Section 10 of the Federal Constitution.

5. Under the charter of the company (p. 54), the assets of the company can be used for two purposes only: (1) to put into a reserve fund to be applied to the acquisition of property, and (2) to declare dividends. In New Jersey the charter constitutes a contract of the shareholders *inter sese* which may not be changed by subsequent legislation, notwithstanding a reserved power to amend. The decision of the Circuit Court of Appeals gives effect to Chapter 175, Laws of 1920, in violation of this contract right, contrary to Article 1, Section 10 of the Federal Constitution.

6. The plan in providing for a sale of stock to employees "by way of additional compensation for services to be rendered" was contrary to the provisions of Chapter 175, Laws of 1920, and to the general corporation law of New Jersey.

7. The sale of the 56,712 shares of the stock by the directors, the larger part to themselves at $87 a share less than its then market value, was a violation of the directors' fiducial obligations and constituted waste.

8. The resolutions of the board of directors authorizing the distribution of the stock as aforesaid, inasmuch as every one of them participated in the profits, were invalid, because not passed by a quorum of a board of disinterested directors.

9. The sale of this stock "by way of additional compensation for services to be rendered" to the company to and including December 31, 1931, i. e., from January 28th to December 31, 1931, was invalid.

10. The Court below had jurisdiction of the consolidated cause.

11. There was no failure on the part of the plaintiff to comply with Equity Rule 27.

Of the foregoing errors, all of which were involved in the decision of the majority of the Circuit Court of Appeals, those numbered 1 to 6 relate to the original invalidity; those numbered 7 to 9 to the execution of the plan; and those numbered 10 and 11 to general questions. The discussion of these last two points is postponed to the end in order to avoid an unnecessary repetition of facts.

The foregoing points will now be discussed in their chronological order rather than in the order of their relative importance.

I.

Disqualification of directors by reason of personal interest to constitute a quorum for passage of the resolution advising the plan.

At the very threshold of this inquiry we are met with the fact that there was no valid resolution of the board of directors formulating a plan and advising its adoption, as Chapter 175, Laws of 1920, required. This was due to the fact that the directors in devising a plan whereby they qualified themselves as participants in potential profits (subsequently realized), at the same time disqualified themselves for voting therefor, or even from being counted as part of a quorum for passage of the necessary resolution. It will be observed that the law required, as a condition precedent to the submission of the plan for approval of the stockholders, that the directors should not only formulate the plan—in detail, as will presently be argued—but should pass a resolution declaring that its adoption was "advisable." The significance of the word "advisable" in this connection is not a matter of doubt. It seems to be settled by judicial utterance, and particularly by the decision of Pitney, J., in *Barrett* v. *Bloomfield,* 64 N. J. Eq. 425, 441, 445. That was a case where the directors were required by law to pass a resolution declaring the dissolution of a corporation "advisable." Judge

Pitney thus commented upon the meaning and importance of the word:

> "I am unable to conceive that the legislature intended that the managers, in judging upon and determining such advisability should take into consideration their own individual interests or that of their friends. * * * It is impossible to escape the conviction, on the case as now presented, that the managers were not acting disinterestedly in resolving that it was *advisable* to dissolve this institution, and that they were liable to be influenced in their judgment on that question by their individual interests, and hence were guilty of an abuse of the authority given them by the act invoked in their justification. *The whole transaction, therefore, upon well settled principles must be held to be prima facie void or voidable, and therefore subject to the review by the Court.*"

To precisely the same effect was the decision of the Court of Appeals of New York in *Kavanaugh* v. *Kavanaugh Knitting Co.*, 226 N. Y. 185, 192.

The law that directors are disqualified to vote, or to be counted for the purpose of making a quorum, as to any matter in which they are interested either actually or *potentially* (compare the citation from *Aberdeen Railway Co.* v. *Blaikie Brothers*, 1 McQueens App. Cas., p. 471, set out under Point VII of this brief), is established by overwhelming authority.

In *Thompson on Corporations*, Section 1257, it is said that "the cases are practically unanimous upon the proposition that a director who is personally interested in a proposition, or as to any matter pending before the board, is disqualified from acting, *and cannot be counted in estimating the quorum.*"

In *Spellman on Corporate Directors*, Section 179, it is said that the rule is established "by an overwhelming weight of authority."

The doctrine is firmly established in New Jersey (*Van Hook* v. *Somerville Mfg. Co.*, 5 N. J. Eq. 137, 169; *Met. T. & T. Co.* v. *Domestic T. & T. Co.*, 44 N. J. Eq. 568, 573; *Gardner* v. *Butler*, 30 N. J. Eq. 702; *Wall* v. *Utah Copper Co.*, 70 N. J. Eq. 17, 26).

In the Second Circuit Court of Appeals itself this question had previously been ruled upon. In *Enright* v. *Hecksher*, 240 Fed. 863, 872, Rogers, J., writing the opinion, said:

> "A director, whose interest in a matter disqualifies him from voting upon a resolution concerning it, cannot, according to the better opinion, be counted when the vote is taken. A director so disqualified by personal interest loses, *pro hac vice*, his character as a director, and so cannot be counted. *That is the law of New Jersey.*

While the decision of the Circuit Court of Appeals necessarily overrules this point, it is not discussed in the opinion.

II.

There was such concealment of important facts which the stockholders were entitled to know, and of intention upon the part of the management, as constituted either actual or constructive fraud and invalidated the transaction *ab initio*.

In the official circular, soliciting their proxies, sent out to the stockholders with the notice of meeting, the following statement was made by the president (p. 38):

> "I am certain that every stockholder will agree that it is to the company's interest that the organization which has made possible the great success which the Company has enjoyed during the past few years should be given every encouragement to continue in the Company's employ. It is the purpose of this plan, conforming with the policies of many large business enterprises, to offer inducements by way of stock ownership in the Company to the men who have made that success possible, so that the Company and its stockholders will have the assurance of their continued services in carrying the business forward with maximum enthusiasm and efficiency."

From this language the stockholders would naturally be led to infer that no other employees' stock plan had ever been put out by the company.

It appears, however, from the allegations of the complaint (par. 21; pp. 26, 27, 32, 33), not denied (p. 196), that the directors had already put into effect without the knowledge or approval of the stockholders (complaint, par. 22, p. 34; answer, par. XIX, p. 197), between the years 1914 and October, 1929, numerous preferred stock plans and two common stock plans from which the employees as a whole and the directors themselves had largely profited. Towards these various plans the company from the year 1914 as its contribution had set aside the sum of $240,000 a year (p. 32). The first preferred stock plans were confined to employees drawing salaries under $3,500 a year; but in the plans commencing in 1921, the salary limit was removed and the directors participated. There were also two common stock plans. In the first, put into effect in 1926, the company bought 21,500 shares of its old $50 par value stock, and sold it at cost, chiefly to the directors, the president taking 8,000 shares and seven other officers, all of whom but one were directors, from 250 to 5,000 shares each. The company, quite illegally, was forced to guarantee the payment of the directors' notes issued to pay for this stock and negotiated with banks in New York City (p. 26).

In the second common stock plan, put into effect in 1929, 51,750 shares of the old stock (equivalent to twice as many shares of the present stock), under the president's direction, without any previous authority from the board, were acquired by the company at $172 a share; and of this old stock 46,500 shares were thereafter sold by the directors to themselves at that price at a time when, as their own resolution states (p. 159), the stock was worth approximately $222 a share, or $50 a share more than they undertook to pay. Moreover, by a series of devious devices set up in sub-sections (e) and (f) of paragraph 21 of the complaint (pp. 29-34), $469,387.23 in 1929 and $917,625.96 in the year 1930 were misappropriated from the company's funds and applied in part payment of this stock.*

* These facts are not denied, the main answer contenting itself with the statement "that the Board of Directors, in their discretion, deemed it beneficial to the interests of the Company and its stockholders to use the moneys so saved in the manner and the form that they were used" (p. 196). The answer of the Guaranty Trust Company says nothing (p. 246).

In addition, the employees as a whole were receiving free medical services; and pensions costing the company $160,000 per annum (p. 25).

In addition, the president was receiving for the year 1930 a fixed salary of $168,000, and profit sharing in the amount of $842,000; the senior vice-president a fixed salary of $98,000, and profit sharing of $505,000; and the other vice-presidents fixed salaries of $50,000 each and profit sharings of from $409,000 to $505,000 (p. 25). All these facts were unknown to petitioner and were not disclosed to the stockholders (complaint, par. 22, p. 34; answers, pp. 197, 247).

The suppression of these facts, it is believed, constituted unfair dealing with the stockholders going to the very root of the entire transaction and invalidating the stock plan *ab initio*. Certainly, the duty to have disclosed these facts is settled by definite authority; and no authority to the contrary has been discovered.

As said in *General Investment Co.* v. *Am. Hide & Leather Co.*, 97 N. J. Eq. 214, 235:

> "No one can say in advance what the effect would have been upon the sentiment of any stockholder had he known all that he was entitled to know."

The reason for this rule is thus stated (p. 233):

> "Any other rule would permit the most ruthless destruction of the rights of the stockholders. Adroit management could frequently prepare a scheme in such innocent guise that ordinary stockholders would not be put upon their guard unless the full discharge of their duties by directors or officers presented the objectionable information which might cause individual stockholders to more carefully scan the proposed plan, and seek competent advice. Furthermore, if the law is to remain a scientific coordinated body of principles, doctrine and rules, there is no reason that fiduciary agents, such as directors, should not be subjected to the underlying directions of the law pertaining to trustees, which they are *sub modo*. There is no better rule established than that 'a trustee is bound to communicate to his beneficiary any knowledge or

> information he may have obtained affecting the beneficiary's interests, so far as they are embraced in or depend upon the trust or confidential relations.'"

In this very case, on the application for an examination of the books, the Special Term of the Supreme Court for New York County, Townley, J., said:

> "Another reason urged why the order should not be granted is the anomalous one that if a board of directors has done its duty as well as the present directors of The American Tobacco Company have performed theirs, a stockholder may not inquire into any plans they may have to benefit employees, considering themselves as employees. It is sufficient answer that the directors are nevertheless, regardless of the magnitude of their success, in the strictest fiduciary relation to the stockholders and must make a full disclosure of what profits they would make out of any scheme submitted by them for the approval of the company."
>
> *Matter of Rogers* v. *Amer. Tobacco Co.*, 143 Misc. Rep. 306, 309.

The opinion in the District Court (p. 275) disposed of this point by the statement that "the plaintiff asks no relief in this suit as to these matters." Actually the relief sought was and is the cancellation of the stock sale plan of 1930-1931 by reason of the deception thus practiced on the stockholders.

There was a further circumstance prior to the stockholders' meeting from which deception on the part of the management may be fairly inferred. In response to a letter written by Mr. Evan Shelby revoking some proxies, including plaintiff's, the following definite statement was made by the president (p. 50):

> "Subscriptions under the plan must be at a minimum but by no means or necessity a maximum price of $25.00 a share.
>
> I trust that in the light of this explanation you and Mr. Rogers will see fit to reconsider your opinion, and I am taking the liberty of enclosing two proxies."

Again, in the official circular sent out to the stockholders with the notice of the meeting, the following language appears (p. 39):

> "It is the expectation of your Board of Directors, if the program set forth in the enclosed notice is approved by the Stockholders, to declare an extra dividend of $4 per share on the Common Stock and Common Stock B now outstanding (the old stock), payable simultaneously with such one hundredth consecutive quarterly dividend, and also, commencing with the one hundred first consecutive quarterly dividend, to initiate the regular quarterly dividends on the *newly authorized shares* of Common Stock and Common Stock B at the annual rate of $5 per share."

This appeal to the acquisitiveness of the stockholders by the promise of an extra dividend of $4 a share "if the program is approved by the stockholders" sheds an unwholesome light upon the entire transaction, and emphasizes the concealment and deception practiced. In the protest read on plaintiff's behalf at the stockholders' meeting it was said:

> "The promise of an extra dividend of $4 is made contingent upon adoption of this resolution, although there is no logical connection between the two. This dividend therefore assumes the form of a bribe to induce stockholders indirectly to approve a proceeding favorable to some of the directors, officers and employees, but costly to the stockholders themselves" (p. 15).

In view of what was subsequently discovered, and what later transpired, it can hardly be said that this characterization was inexact.

Concealment is a badge of fraud; and of all the forms that fraud may take, perhaps there is none more craven, more insidious, or more pernicious in its consequences than suppression of the truth.

III.

The plan submitted inasmuch as it left everything to the president "pursuant to authority to be granted by the board of directors for such purpose" was not a definite or formulated plan such as Chapter 175 L. of New Jersey, 1920, required.

The law (Chap. 175) required the directors to formulate a plan and pass a resolution that its adoption was "advisable." It in terms provided for the sale of stock by the company to "any or all of its employees." The words "any or all' in statutes of this character are generally used in a distributive sense (3 *Cor. Jur.* 232, 244), and it would seem that the legislative design was to allow *any* employee in good standing to become a stockholder of the company. The only definite term or condition fixed by the "plan," however, was that the stock should not be sold below par. Everything else, the choice of employees, the amounts allotted to each, the price, terms and conditions, by express provision, were to be determined by the president pursuant to "authority to be granted" to him by the board of directors (p. 41). Under this arrangement the president did not confine his selections entirely to employees of the company (p. 22); and no rank and file employee was allowed to participate; whereas, by adopting a formula based on fixed salary and contingent compensation (p. 100)—in his own case amounting to $1,008,000 for 1930, and in the case of the vice-presidents running from $145,000 to $603,000 for the same year—he and the vice-presidents were enabled to obtain 30,125 shares out of a total of 56,712 (p. 131) at $87 a share less than the market value.

Under these circumstances, Swan, J., dissenting, was of the opinion that the plan was nothing more than a proposal; that it was not such a formulated plan as the statute contemplated. He says (p. 299):

> "It was a proposal that the stockholders abrogate the discretion which the statute vested in them to ap-

> prove or disapprove a formulated plan declared by the directors to be advisable, and confer upon the directors and president complete discretion to determine and execute in the future, without further reference to the stockholders, any sort of allotment then thought desirable, provided only that the price to employees who were selected to share in it be not less than the par of the stock. The purpose of the statute was to let the stockholders know with some definiteness—'a formulated plan'—what the directors thought advisable, and to allow the stockholders to approve it, if at least two-thirds of them also deemed it advisable. This purpose is completely frustrated if it be sufficient to submit a plan which merely proposes that the directors shall be empowered to allot stock to employees on such terms as they may thereafter please. And the undesirability of transferring to the directors complete discretion as to what plan shall be formulated in the future is particularly apparent where, as here, they are entitled to benefit under the plan. It is aptly illustrated by what in fact happened."

He then alludes to the large allotments received by the president and other directors above outlined, as illustrating the undesirability of transferring to the directors so complete a discretion. Nothing can be added to this argument. The point was not discussed in the majority opinion.

IV.

The disregard of the stockholders' pre-emptive rights.

The pre-emptive right of stockholders to subscribe to new stock was said by this Court in *Miles* v. *Safe Deposit Co.*, 259 U. S. 247, 252, to be so universally recognized as to have become "axiomatic in American corporation law."

It has always been fully recognized in New Jersey: *Way* v. *American Grease Co.*, 60 N. J. Eq. 263; *Wall* v. *Utah Copper Co.*, 70 N. J. Eq. 17; *Morganstern* v. *American Milling Co.*, 87 N. J. Eq. 358; *Graussman* v. *Porto Rico Am. Tob. Co.*, 95 N. J. Eq. 155, 165. In the latter case it was said:

"the right of the present stockholders to have a first call upon the new stock cannot be defeated by any corrupt or other plan of the directors." In *Borg* v. *International Silver Co.,* 11 Fed. (2nd) 147, 151, opinion by Learned Hand, J., it was said: "To deprive them (the stockholders) of their right of pre-emption is to change their contract."

This rule, long recognized as a part of the common law of New Jersey, was crystallized into statute law by the Act of 1926, passed six years after the employees' aid act of 1920, and before the program of 1930 was initiated. This law (G. C. A., Sec. 124; Smith, Vol. 2, p. 80) reads as follows:

> "Upon the issue of capital stock for cash, unless otherwise expressly provided in the certificate of incorporation, or in by-laws adopted by two thirds in interest of each class of stockholders, every stockholder shall have a right (unless waived by him) according to the number of shares held by him to purchase his pro rata proportion of the stock to be issued, at such price (which may be in excess of the par value), within such time and on such terms as shall be fixed and determined by the board of directors."

Inasmuch as neither by the charter nor by any by-law had this pre-emptive right been surrendered by the stockholders, it could be taken away, if at all, only by an amendment of the charter approved by two-thirds of the stockholders of all classes outstanding. Under a familiar principle of statutory construction, that statutes must be reconciled (*McKee* v. *United States,* 8 Wall. 163, 167), the Act of 1920 should be confined to those corporations which either by the original charter, or possibly an amendment thereof, have cancelled this pre-emptive right.

The majority of the Circuit Court of Appeals attempted to meet this objection by the statement that the statutory right of pre-emption applied only for an issue and sale of the stock for "cash" (p. 295).

The stock, however, *was* issued for cash, if this be the important consideration. It was sold immediately to the Guaranty Trust Company, not even an employee, at $25 a share; and was re-offered to the directors and selected list of officers

by the Guaranty Trust Company at the same price (pp. 21, 90). The Act of 1920, under which the plan was passed, does not provide for a sale for other than cash, although it authorizes the purchase price to be paid in instalments, and for company aid in paying for it.

There is even a further fundamental question of contract right involved. Under the decisions of New Jersey, the charter is a contract between the shareholders *inter sese*, which may not be changed by subsequent legislation, notwithstanding a reserved power to amend (*Kean* v. *Johnson*, 9 Eq. 401; *Zabriskie* v. *Hackensack Ry. Co.*, 18 Eq. 178, 191, 192; *Black* v. *Del. & Rar. Canal Co.*, 24 Eq. 456; *Mills* v. *The Central R. R.*, 41 Eq. 1; *Loewenthal* v. *Rubber Co.*, 52 Eq. 440, 441; *German Ins. Co.* v. *Schwarzwaelder*, 59 Eq. 589; *Re Newark Library Assn.*, 64 N. J. L. 217, 219; *Einstein* v. *Raritan Woolen Mills*, 74 Eq. 624, 629; *Itiso* v. *Met. Sav. & Loan Co.*, 68 N. J. L. 588, 590; *Colgate* v. *U. S. Leather Co.*, 75 Eq. 229; *Riker* v. *United Drug Co.*, 79 Eq. 580, 583).

If this be so, the pre-emptive right, without the stockholders' consent, could not be taken away even under the Act of 1926; certainly not under the Act of 1920. This contract right seems to be recognized in the recent case of *Scott* v. *Lorillard Co.*, 108 N. J. Eq. 153, aff'd by the Court of Errors and Appeals, 109 N. J. Eq. 417, where the case proceeded upon the assumption that under the employees' stock plan in that case, it was essential that the stockholders waive their pre-emptive rights.

V.

Disposition of assets contrary to the charter contract of the shareholders *inter sese*.

Moreover, it is evident that any construction of the Act of 1920 which would make it justfy a dissipation of corporate assets—amounting to nearly $5,000,000 with respect to only 56,712 shares out of the 312,968 available—would equally violate the plaintiff's charter contract.

The charter contained the following provision:

> "The directors of said merged corporation shall have the power to fix and determine from time to time and to vary the sum to be reserved, over and above its capital stock paid in, as a working capital, before declaring any dividends among its stockholders, * * * and to direct and determine the use and disposition of any surplus or net profits or earnings, over and above the capital stock paid in. All sums so reserved may be applied from time to time to the acquisition of property as the directors shall from time to time determine" (p. 54).

It is the plaintiff's contention that under this provision the assets of the company could be applied only (1) to put in a reserve fund to acquire property as directed by the board, or (2) to payment of dividends.

The law of New Jersey is thus stated by the highest Court of the State in *Riker* v. *United Drug Co.*, 79 N. J. Eq. 580, 583:

> "Each stockholder of the company owns a share in its property and assets, and is entitled to have a proportionate share in its profits. They have invested their capital in it, and in it alone, and they are entitled to every dollar that it earns. This is the agreement of the stockholders among themselves. They each contract with the others that their money shall be employed for the purposes specified in the certificate of incorporation, and for no other purpose, and that the profits of the enterprise shall be ratably apportioned among them. In the absence of legislation permitting a variation of the provisions of this fundamental contract, by vote of a majority of the stockholders, no majority, however large, has the right to divert any part of the joint capital, however, small, to any purpose not consistent with and growing out of this original, fundamental agreement" (citing *Black* v. *Del. & Raritan Canal Co.*, 24 N. J. Eq. 456, 463; *Mills* v. *Central Railroad Co.*, 41 Eq. 1; *Colgate* v. *U. S. Leather*, 75 Eq. 229).

The rule laid down in *Dodge* v. *Woolsey,* 18 How. 331, 341, 342, is to the same effect, where the rule was approved:

> "It is a breach of trust towards a shareholder in a joint-stock incorporated company, established for certain definite purposes prescribed by its charter, if the funds or credit of the company are, without his consent, diverted from such purpose, though the misapplication be sanctioned by the votes of the majority; and, therefore, he may file a bill in equity against the company in his own behalf, to restrain the company by injunction from any such diversion or misapplication."

It can hardly be disputed that a sale of 56,712 shares of the company's capital stock at nearly $5,000,000 less than its then value is a disposition of corporate assets. Inasmuch as the charter did not authorize such use of corporate property; and inasmuch as the authorities cited under Point IV show that the charter constitutes in New Jersey a contract among the shareholders *inter sese* not subject to alteration by a later legislative act, even under a reserved power to amend, it is submitted that the decision of the Circuit Court of Appeals allowing this to be done under cover of a later statute violated plaintiff's contract and at the same time denied him constitutional protection.

VI.

The plan in providing for a sale of stock to employees "by way of additional compensation for services to be rendered" was contrary to the provisions of Chapter 175 L., 1920, and to the general corporation law of New Jersey.

Finally, the plan three times, under the heads of "Purpose," "The Plan," and "Execution of the Plan" (p. 47), provided that the allotment of stock thereunder was "by the way of

compensation for services to be rendered." Presumably, these provisions were inserted in contemplation of what was subsequently carried out, i. e., a sale of stock at $87 a share less than its then market value. The provision has the appearance of a device intended to import consideration into a transaction which to the extent named would otherwise be wholly lacking therein. But there was no authority in the Law of 1920 for the insertion of any such provision. That act provided only for "the purchase and sale of its capital stock to any and all employees," and for its payment in instalments. It is true, it authorized the company to aid such employees in paying for such stock by contributions, compensation for services, or otherwise. But this language seems to imply a sale in the first instance at a fair price, that is to say, a price related to the actual or market value of the stock, and the application to the price of any contribution the company might make, or of any wages or salaries the employees might otherwise have earned. The statute certainly did not contemplate an issue of stock as additional compensation for services to be rendered; and any such construction of the Act of 1920 directly conflicts with the previous Act of 1917 (L. 1917, Chap. 195; Sec. 1; *Smith on N. J. Corporations,* p. 110), which provides only that a New Jersey corporation "may issue stock for the amount it actually pays for *labor performed.*" It could hardly be contended that the Act of 1920 contained even an implication that the previous Act of 1917 was modified or repealed thereby. But even if such implication were possible, it remains to be said that under the law of New Jersey, as elsewhere, repeals by implication are not favored.

The foregoing points relate to the original invalidity of the plan. I now come to deal with those points which, assuming *arguendo,* but *arguendo* only, its original validity, are directed at its subsequent execution. And the most important of these is

VII.

The violation of the directors' fiduciary obligation and waste in the sale of the stock.

The stock amounting to 56,712 shares, as has been stated, was sold by the directors at $87 a share less than its then market value. Of this amount the president received 13,440 shares, an aggregate profit of $1,169,000; the other directors, 19,330 shares, an aggregate profit of $1,681,000. The remainder was sold to higher employees (Ex. H, p. 131), with the exception of 1,780 shares sold to others ranked by the company as "miscellaneous," and not believed to be employees in the sense of either statute or plan (pp. 22, 153).

This proceeding was justified by the majority of the Circuit Court of Appeals upon the ground that "the selling price of stock on the market (which is always subject to fluctuation) will not justify an allegation of insufficient consideration amounting to fraud. The corporation received what those in charge of its internal affairs deemed to be sufficient as its par value"; that is to say, the directors, who alone in New Jersey have corporate management (Sec. 12, G. C. A.; Smith, p. 192).

Inasmuch as the error at this point is believed to be opposed to elementary principles, it may not be amiss to cite the leading cases in which those principles were first formulated; and then to inquire whether the "inflexible" rule therein laid down has been relaxed.

The leading cases seem to be *Ex parte James*, 8 Ves. Jun. 337, decided by Lord Eldon in 1803; *Davoue* v. *Fanning*, 2 John. Ch. 252, decided by Chancellor Kent in 1816; *Michoud* v. *Girod*, 4 How. 503, decided by this Court in 1854; and *Aberdeen Ry. Co.* v. *Blakie Brothers*, 1 MacQueen's App. Cas. 461, decided by the House of Lords in 1854.

In *Ex parte James*, Lord Eldon declared (p. 345):

> "The doctrine as to purchases by trustees, assignees and persons having a confidential character stands much more upon general principle than upon the circumstances of any individual case. It rests upon this:

> that the purchase is not permitted in any case, however honestly the circumstances, the general interests of justice requiring it to be destroyed in every case; as no court is equal to the examination and ascertainment of the truth in much the greater number of cases."

In *Davoue* v. *Fanning,* it was held that, where the trustee, or person acting for others, becomes interested in the purchase, the *cestui que trust* is entitled as of course to have the sale set aside; and that it makes no difference that the sale was at public auction, at a fair price, or that the trustee purchased for a third person. Dealing with the "true principle" the Chancellor observed (p. 260):

> "However innocent the purchase may be in the given case, *it is poisonous in its consequences* * * *. There may be fraud, as Lord Hardwick observed, and the party not able to prove it. It is to guard against this uncertainty and *hazard* of abuse and to remove the trustee from temptation, that the rule does and will permit the cestui que trust to come at his own option, and without showing actual injury, and insist upon * * * another sale." (The italics are the Court's.)

In *Michoud* v. *Girod,* after an elaborate review of all the precedents, concluding with *Davoue* v. *Fanning,* of which case it was declared that it was not too much to say that it had "secured the triumph of the rule over all qualification and relaxation of it in the United States to the same extent that had been achieved for it in England by that great chancellor, Lord Eldon" (p. 556), this Court laid down the rule broadly that a purchase by a trustee is *fraudulent* and *void,* although a fair price be paid. The Court said, no one dissenting:

> "The general rule stands upon our great moral obligation to refrain from placing ourselves in relations which ordinarily excite a conflict between self-interest and integrity. It restrains all agents, public and private; but the value of the prohibition is most felt, and its application is more frequent, in the private relations in which the vendor and purchaser may

> stand towards each other. The disability to purchase is a consequence of that relation between them which imposes on the one a duty to protect the interest of the other, from the faithful discharge of which duty his own personal interest may withdraw him. In this conflict of interest, the law wisely interposes. It acts not on the possibility, that, in some cases, the sense of that duty may prevail over the motives of self-interest, but it provides against the probability in many cases, and the danger in all cases, that the dictates of self-interest will exercise a predominant influence, and supersede that of duty. It therefore prohibits a party from purchasing on his own account that which his duty or trust requires him to sell on account of another, and from purchasing on account of another that which he sells on his own account. In effect, he is not allowed to unite the two opposite characters of buyer and seller, because his interests, when he is the seller or buyer on his own account, are directly conflicting with those of the person on whose account he buys or sells."

In *Aberdeen Railway Co.* v. *Blakie Brothers,* the doctrine of the foregoing cases was first applied to corporate directors. A director there had purchased for the railway company certain iron chairs from a firm in which he was a partner. Opinions were rendered by the Lord Chancellor Cranworth and by Lord Brougham. The Lord Chancellor said (p. 471):

> "A corporate body can only act by agents, and it is of course the duty of those agents so to act as best to promote the interests of the corporation whose affairs they are conducting. Such agents have duties to discharge of a fiduciary nature towards their principal. And it is a rule of universal application that no one, having such duties to discharge, shall be allowed to enter into engagements in which he has, or *can have,* a personal interest conflicting, *or which may possibly conflict,* with the interests of those whom he is bound to protect. So strictly is this principle adhered to that no question is allowed to be raised as to the fairness or unfairness of a contract so entered into. * * * So inflexible is the rule that no inquiry on that subject is permitted." (Italics not the Court's.)

The doctrine of these pioneer authorities has never been weakened in this Court by what elsewhere has been aptly called "disintegrating erosion" (*Wendt* v. *Fischer,* 243 N. Y. 439, 444).

The decision in *Michoud* v. *Girod* was later approved in *Magruder* v. *Drury,* 235 U. S. 106, 119, which the concluding part of the language above set out was quoted and the succinct statement made:

> "A trustee can make no profit out of his trust."

In *Jackson* v. *Smith,* 254 U. S. 586, 589, the doctrine of *Michoud* v. *Girod* was again followed.

The latest case in this Court in which *Michoud* v. *Girod* is approved is *United States* v. *Dunn,* 268 U. S. 121, 131, where it was said:

> "It is sufficient to establish that the fiduciary has exercised his power of disposition for his own benefit without more."

See also: *Wardell* v. *Railroad Co.,* 103 U. S. 651, 658.

The uncompromising attitude of later-day courts with respect to this doctrine is thus stated in a recent decision of the Court of Appeals of the State of New York (*Meinhard* v. *Salmon,* 249 N. Y. 458, 464), where the Court was dealing with the subject of loyalties between partners:

> "A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior. As to this there has developed a tradition that is unbending and inveterate. Uncompromising rigidity has been the attitude of courts of equity, when petitioned to undermine the rule of undivided loyalty by the 'disintegrating erosion' of particular exceptions (Wendt v. Fischer, 243 N. Y. 439, 444). Only thus has the level for fiduciaries been kept at a level higher than that trodden by the crowd. It will not consciously be lowered by any judgment of this court."

It would seem that the authority of the foregoing cases goes far beyond the requirements of the case at bar; for the stock here was sold by the director-trustees largely to themselves at a mere fraction of its real value, under circumstances showing a self-consciousness of wrongdoing. In *Michoud* v. *Girod,* circumstances much less reprehensible were declared by this Court as a matter of law to be fraudulent and void.

The defense of the directors, so far as can be gathered from their previous arguments, appears to be that, under the terms of the plan, which they "advised," they were qualified to become purchasers of the stock. They apparently rely upon the following provision (p. 49):

> "No employee or person actively engaged in the conduct of the business of the corporation, or its subsidiaries, shall be deemed ineligible to the benefits of the plan by reason of his being also a director of the corporation or of any of its subsidiaries or of holding any office therein."

The effect of this clause as rendering the initial resolution void and of no effect has been adverted to under Point I. At this place it is only necessary to point out that nothing in this clause justified the directors in selling three-fifths of the stock to themselves at one-fifth of its value. The fact that the plan placed a minimum of par below which the stock could not be sold certainly could not have that effect. As the president himself said, when soliciting proxies for the meeting, under circumstances heretofore mentioned, that clause simply meant, "subscriptions under the plan must be at a minimum but by no means or necessity a maximum price of $25 a share" (p. 50). The elementary duty of the directors, even if they were justified in including themselves, which cannot be conceded, to sell to all employees at at least a fair value, remained unaffected.

The argument here, however, would seem to be foreclosed by the observation of this Court in *Michoud* v. *Girod, ubi supra.* Dealing with the exception that a purchase by a trustee of his *cestui que trust,* provided that it is deliberately

agreed or understood between them that the relation shall be dissolved, and that there is no fraud, concealment or advantage taken by the trustee (circumstances lacking here) will be sustained in a court of equity, was careful to add (4 How., at p. 556):

> "But it is difficult to make out such a case where the exception is taken, especially where there is any inadequacy of price or any inequality of the bargain."

And so likewise in *Twin Lick Oil Co.* v. *Marbury,* 91 U. S. 587, treating of the exception that where a director had loaned needed money to his company and taken security, he might protect himself by buying in the property at a fair price at public sale, the Court nevertheless said that it was a "doctrine founded on the soundest morality" that such a transaction might be set aside on "slight ground"; and the principle was again reiterated that a transaction where an agent to sell buys of himself was "void."

Finally, to repeat what was said in the recent case of *United States* v. *Dunn,* 268 U. S. 121, 131:

> "It is sufficient to establish that the fiduciary has exercised his power of disposition for his own benefit without more."

Although the matter here is governed by the principles of general equity jurisprudence, as to which this Court will exercise its own judgment (*Russell* v. *Southard,* 12 How. 139, 147), it can be said that the doctrine of the courts in New Jersey is in accord with the principles laid down in this tribunal.

In *Booth* v. *Beattie,* 95 N. J. Eq. 776, the Court of Errors and Appeals approved this statement of the law:

> "The rule is that contracts made by a board of directors with one of their own number are, regardless of merits, voidable at the option of a dissatisfied stockholder, while such contracts sanctioned by a majority of the stockholders will be set aside by a court if it is disadvantageous to the minority stockholders. Equity will investigate."

In *Marr* v. *Marr,* 73 N. J. Eq. 643, 650, Judge Pitney declared that where a director purchased corporate property even at a sheriff's sale it was a controlling circumstance that the director purchased at half the value.

In *Barry* v. *Moeller,* 68 N. J. Eq., at p. 489, it was said by Garrison, J.:

> "In cases where sales of property of the corporation are made to directors, the latter are charged with the full value of the property received, the contract price as fixed by the wrongdoer being completely disregarded."

In conclusion, it is respectfully submitted that to permit a rule to be established in the highest Federal court in so important a commercial community as New York, to the effect that directors may sell stock to themselves or any others at one-fifth of its market value because stock has a fluctuating value, or because that is a matter of internal control, will imperil the rights of stockholders everywhere.

VIII.

The resolutions authorized the sale of the stock as aforesaid were invalid, inasmuch as they were not passed by a quorum of a board of disinterested directors.

The law upon this subject, with supporting authorities, has been set out under Point I.

An examination of the minutes of the directors' meeting of January 28, 1931, when the stock was distributed (Ex. F, p. 79), show that at this meeting every director present had already been selected by Mr. Hill, the president, for his quota of stock. The directors then approved in rotation the allotment to each director, every director being recorded as not voting on his own allotment, but as voting in favor of the distribution to all other directors. It is needless to say that each director immediately availed himself of the privi-

lege thus manipulated (complaint, p. 24; answer, p. 191; Ex. H, p. 131).

It would be difficult to imagine a situation more clearly revealing a self-consciousness of impropriety upon the part of the directors; or the adoption of a more ineffective device to escape it. It has been expressly held that voting in rotation has the same effect as if each director voted upon his own proposition (*McNab* v. *McNab & Harlin Mfg. Co.*, 62 Hun 18, 22; aff'd by the Court of Appeals, 133 N. Y. 687).

IX.

The sale of the stock "by way of additional compensation for services to be rendered to and including December 31, 1931," i. e., from January 28 to December 31, 1931, was invalid.

On January 28, 1931, based upon the experience of the calendar year just closed, the president was already receiving in fixed salary and cash bonus $1,010,000 a year; four vice-presidents, $450,000 to $555,000 a year each; one, Taylor, $50,000 a year; and all other employees the ample compensation set out in Exhibit H, page 131. It was altogether unlikely that this additional consideration amounting to approximately $5,000,000 for 528 employees was necessary to glue them to their posts for a further period of eleven months. Evidently, therefore, this formula was nothing more than a conveyancer's device invented to import consideration into a transaction which was recognized as otherwise lacking of adequate consideration.

The device was, however, unavailing, because Chapter 175, Laws of 1920, did not authorize stock to be sold to employees "by way of compensation to be rendered"; while, upon the other hand, the General Corporation Law authorized stock to be issued only "for labor performed" (L. 1917, Chap. 195, Sec. 1; Smith, p. 110).

The proceedings authorized at this meeting were likewise invalid in the following additional particulars:

The sale in the first instance was a sale to the defendant Guaranty Trust Company, which was not an employee of The American Tobacco Company. It was, therefore, a sale to an outsider contrary to the very terms of the plan.

Among the participants approved by the directors were the individual trustee, associated with the Trust Company; an individual member of the law firm which was counsel to the Tobacco Company; the advertising agent; and two others: all grouped by the company itself under the head of "Miscellaneous" (p. 153); and not properly "employees" in the sense of the plan.

Moreover, the plan did not in fact provide for the interposition of trustees, even though under the statute it might have so provided.

X.

The District Court had jurisdiction of the consolidated cause.

The District Court admitted jurisdiction, but declined to exercise it "in its discretion," because it presented questions for construction of New Jersey statutes (p. 281). The Circuit Court of Appeals affirmed the decree below; although it actually assumed jurisdiction and discussed the case upon the merits. In their reply to the petition for a certiorari, the defendants have taken the position that the jurisdictional question was out of the case and that "this Court would concern itself solely with the question whether the dismissal of the complaints was proper under the applicable New Jersey law." As all parties are now agreed, it would seem unnecessary to discuss this question. As Chief Justice Marshall once said (*Mason* v. *The Blaireau*, 2 Cr. 240):

> "Whatever doubts may exist in cases where the jurisdiction may be objected to there ought to be none where the parties assent to it."

It may be said, however, that the District Court in declining as a discretionary matter to exercise an admitted jurisdiction was proceeding contrary to law.

The undisputed facts are that The American Tobacco Company was licensed to do business under the laws of New York, with its principal place of business in New York City, where its chief executives have their offices, where its board of directors customarily meets, and where its principal records are kept. Only one director, the sole individual defendant with the Tobacco Company in the first of the consolidated causes, is a resident of New Jersey. The stock sought to be cancelled is in the possession of the Guaranty Trust Company, a New York corporation which could not be reached in New Jersey, and which is a party to the second consolidated cause. Under these circumstances, the decision of the Circuit Court of Appeals in *Williamson* v. *Missouri-Kansas Pipe Line Co.*, 56 Fed. (2nd) 503, 511, is applicable. The Court there said:

> "Bearing upon the question of expediency, convenience, and power to effectuate a decree in case one should be rendered, each appellee has all of its books and records, its principal office, most of its business, many of its officers and directors, including its president, and part of its assets within this jurisdiction, and neither is doing any business in Delaware, or maintaining any office in that State except as is necessary under the laws of Delaware to maintain its corporate existence. Each appellee is licensed to do business in Illinois, and has been served with process in this cause. Under the allegations of the bill we think that considerations of neither justice nor expediency point to the courts of Delaware as the appropriate tribunals to investigate and determine the charges made in the bill as against Parish & Co., and that the District Court has ample power to effectuate any judgment it may render, under the evidence, against Parish & Co. We think the trial court erred in declining to exercise jurisdiction."

Apart from this authority, the case was in the District Court by reason of diverse citizenship. There were also involved one or more Federal questions. Under either aspect

the District Court could not decline jurisdiction, for the reason thus expressed in *Suydam* v. *Broadnax*, 14 Pet. 67, 75:

> "The 11th section of the act to establish the judicial courts of the United States carries out the constitutional right of a citizen of one State to sue a citizen of another State in the circuit court of the United States, and gives the circuit court 'original cognizance, concurrent with the courts of the several states, of all suits of a civil nature, at common law, and in equity,' &c., &c. It was certainly intended to give to suitors, having a right to sue in the circuit court, remedies coextensive with these rights."

In *Hyde* v. *Stone*, 20 How. 170, 175, it was said that the Federal courts are bound to afford redress to suitors in every case to which their jurisdiction extends:

> "They cannot abdicate their authority or duty in any case in favor of another jurisdiction."

See also, *Chicot* v. *Sherwood*, 148 U. S. 529, 534; *McClellan* v. *Carland*, 217 U. S. 268, 281; *Kline* v. *Burke*, 260 U. S. 226, 230.

In any event

> "dismissal must rest on the ground that there was want of equity, not on lack of jurisdiction."
>
> *Burnrite Briquette Co.* v. *Riggs*, 274 U. S. 208, 213.

XI.

Alleged failure to comply with Equity Rule 27.

The majority opinion (p. 296) holds that petitioner is barred because of failure to combine with two other stockholders and call a meeting to cancel the employees' stock plan under Sec. 46 of the General Corporation Act of New Jersey (Chap. 185, L. 1896; Smith, p. 228), which provides that three or more stockholders of New Jersey corporations

may call a stockholders' meeting. To say nothing of the prohibitive cost and practical impossibility of petitioner's calling a meeting of stockholders of so large a company, it is submitted that this decision (1) disregards the actual situation here presented, and (2) violates the reason of Rule 27.

The dissenting opinion of Swan, J. (p. 301), deals with this question. The petitioner will, therefore, only briefly summarize the reasons why under the facts of this case Rule 27 had no application.

First, the plan is claimed to be illegal. If so, there is nothing to repeal.

Second, if the plan could be considered legal, it was wastefully carried out, and in a manner contrary to its very terms. Evidently in this latter aspect the plan does not require repeal.

Third, the plan itself requires any repeal or modification to be carried out under the provisions of Chapter 175, Laws of 1920. This act in turn requires a repeal to be effected in the same manner as the plan is passed, i. e., as a condition precedent to a stockholders' meeting the board of directors must first pass a resolution "advising" repeal. As the board of directors are all pecuniarily interested, have all participated in the benefits of the plan, have declined to sue on written demand (pp. 17, 18), and have actively defended this action, relief through this channel is obviously impossible.

In *Hawes* v. *Oakland*, 104 U. S. 450, 461, out of which Rule 27 grew, an appeal to stockholders was said to be unnecessary where "it was not *reasonable* to require it." In the leading case of *Del. & Hud.* v. *Al. & Susquehanna R. R. Co.*, 213 U. S. 435, 440, 452, it was said the rule "is intended to have a *practical* operation, and to have that it must, as to its requirements, be given such play as to fit the conditions of different cases." The rule itself provides for an appeal to stockholders only where "*necessary.*"

An instructive case upon this point is *Continental Securities Co.* v. *Belmont*, 206 N. Y. 7, 15, 19, where this very question was the main point decided. In that case it was held that it was not necessary for a complaining stockholder,

in addition to alleging a demand upon the directors to bring the action and their neglect and refusal to do so, to allege that he had given notice of the alleged fraud to the stockholders and had demanded of them that some action be taken by them to redress the wrong. The Court pointed out that under the law of New York stockholders cannot act in relation to the ordinary business of the corporation. The same rule prevails in New Jersey (Sec. 12, G. C. A.; Smith, p. 192). After an extended discussion, the Court concluded with the following observations on the rule in *Hawes* v. *Oakland:*

> "The decision reported in Hawes v. Oakland (104 U. S. 450) and other similar decisions in the Federal and state courts are not in conflict with the decision about to be rendered herein. In such cases, as in this case, it is asserted that an application to the body of stockholders is unnecessary when it is unreasonable to require it. If the body of stockholders has no adequate power or authority to remedy the wrong asserted by the individual stockholders it is unreasonable and unnecessary to require an application to it to redress the wrong before bringing a representative action."

With the vast increase in the size of the corporations in this country it must be increasingly evident that an appeal to stockholders by a single stockholder to overthrow a seated management is a futile remedy (see opinion of Swan, J., p. 300). Such a requirement would effectually amount to a denial of justice in many cases, and give to Rule 27 that impractical application which this Court has condemned. In the case at bar, however, for the reasons stated, Rule 27 had no application.

Even less is to be said of the comment in the majority opinion that in the spring of 1931 the stockholders re-elected the old board. As said in *Continental Securities Co.* v. *Belmont, supra,* at p. 17, in a similar connection:

> "For reasons wholly apart from the matter in dispute the stockholders may not desire to change a majority of the persons comprising its board of directors."

Fourth Separate Defense.

This defense sets forth in great detail the progress of the company and the accomplishments of the management, particularly the president, in that connection. The majority opinion below dwells at some length upon these circumstances; but it is obvious that none of the allegations in that regard are relevant to the issues raised by the complaint.

In *Jacobson* v. *Brooklyn Lumber Co.*, 184 N. Y. 152, 161, dealing with a similar question, the Court of Appeals of New York said:

> "If the individual defendants have illegally and wrongfully occasioned a loss to the defendant corporation, it is neither a defense nor a mitigating circumstance that despite such illegal and wrongful acts the corporation is still solvent, or that the stock has increased in value during the time when the alleged illegal and wrongful acts have been committed. (*Kavanaugh* v. *Commonwealth Trust Co.*, 181 N. Y. 121.)
>
> Neither the good faith, honesty nor legality of the acts of officers of a corporation can be determined by ascertaining whether the market value of the capital stock of the corporation has increased or diminished during the time when said acts were performed. A corporation may lose money notwithstanding good, faithful, honest endeavor by its officers, and it may increase its assets notwithstanding selfish and illegal acts by them."

To the same effect was the decision of the New York Court on the application for an examination of the company's books; cited under Point II (*ante*, p. 14) of this brief.

CONCLUSION.

The facts are all before this Court; no further issues remain to be presented; if a wrong has been committed, immediate and final injunctive relief is required to prevent irreparable injury, inasmuch as there is at present no legal barrier to the distribution of the stock now in the hands of the Guaranty Trust Company, or to a similar disposition by the directors of the balance claimed to be available. The plaintiff, therefore, indulges the hope that this Court may see its way clear to make a final disposition of this cause (*Mast. Foos & Co.* v. *Stover Mfg. Co.*, 177 U. S. 485, 495).

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1932

No. 227

RICHARD REID ROGERS, *Petitioner,*

against

GUARANTY TRUST COMPANY OF NEW YORK, JUNIUS PARKER, GEORGE W. HILL, VINCENT RIGGIO, J. B. HARVIE, R. J. BOYLAN, and THE AMERICAN TOBACCO COMPANY, *Respondents,*

and

C. F. NEILEY, A. C. MOWER, J. K. FLETCHER, CHARLES A. PENN (Deceased), and C. S. KEENE (Deceased), *Defendants.*

RICHARD REID ROGERS, *Petitioner,*

against

THE AMERICAN TOBACCO COMPANY and T. R. TAYLOR, *Respondents.*

Consolidated Cause.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR CERTIORARI

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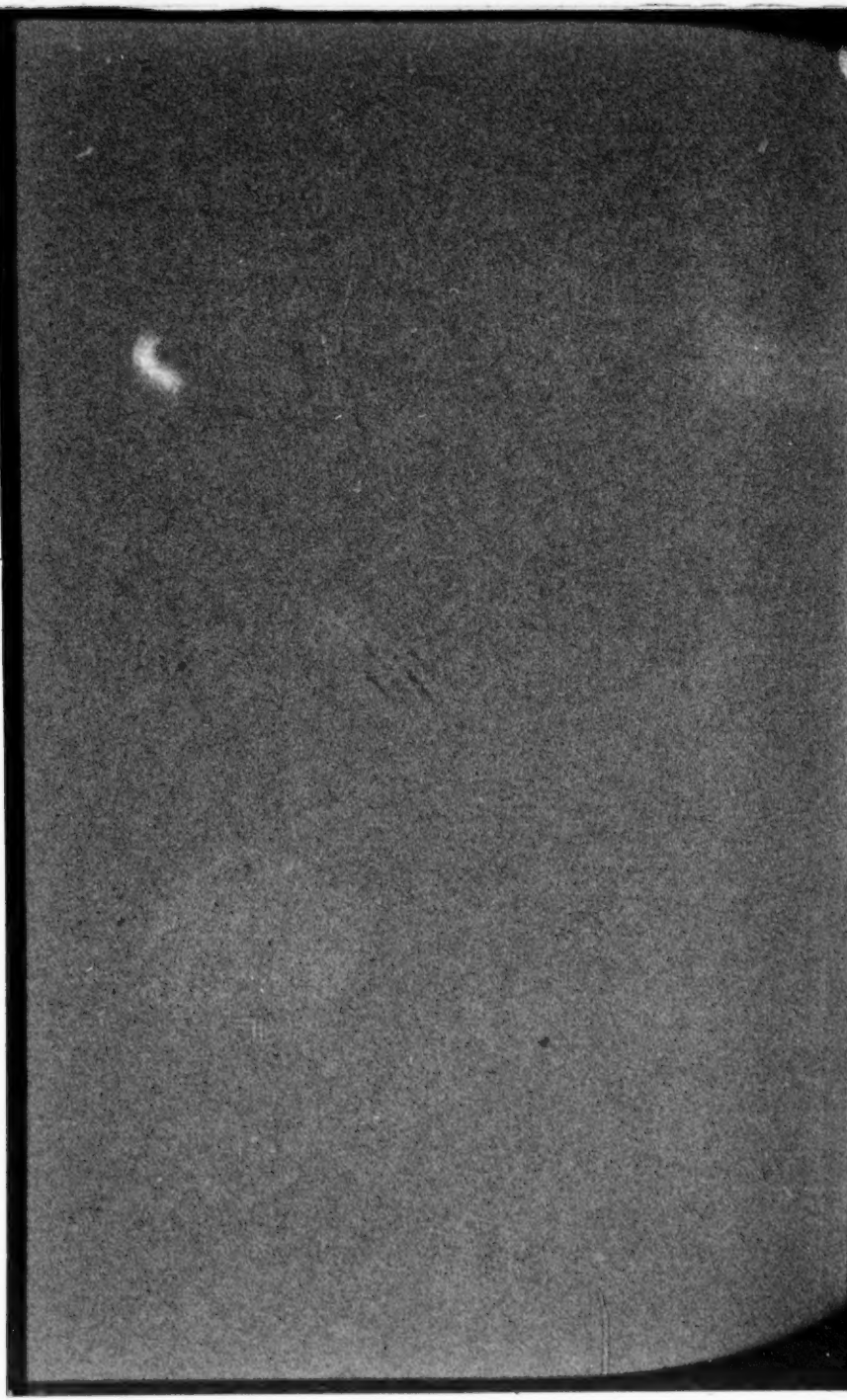

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against

THE AMERICAN TOBACCO COMPANY and T. R. TAYLOR,
Respondents.

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR CERTIORARI.

Preliminary Statement.

These suits in equity originated in the New York Supreme Court, in which petitioner, a holder of record of 200 shares of Common Stock and 400 shares of Common Stock B of The American Tobacco Company, a New Jersey

corporation (hereinafter called the "Company") (R., pp. 12, 181), sought to enjoin the execution of an Employees' Stock Subscription Plan (hereinafter called "Plan") (R., pp. 35-36, 40-42). This Plan was duly authorized by 80% of the Company's outstanding stock and more than 99.99% of that present in person or by proxy, at a special meeting held, after due notification, for such purpose on July 28, 1930 (R., pp. 198-199, 253-256). Petitioner sought also to obtain cancellation of the stock, issued pursuant to the Plan, and nullification of the agreements under which shares of the Company's stock had been allotted to 535 different employes of the Company, including directors and officers who were active employes (R., pp. 35-36, 131-153).

The actions were duly removed to the Federal Court (R., p. 2) and thereafter petitioner served amended complaints (R., p. 3). The actions were then consolidated (R., p. 3) and answers were interposed by the appearing defendants (R., p. 3).

After joinder of issue petitioner made his motion to strike out the defenses, for judgment *pro confesso,* or, in the alternative, for an injunction *pendente lite* (R., p. 3).

The District Court denied that motion and in the exercise of its discretion, dismissed the bills of complaint without prejudice to petitioner instituting action in New Jersey (R., pp. 273-279).

Petitioner appealed to the Circuit Court of Appeals where he sought final disposition of the case* (Applts. Br., p. 28). Thereupon the latter tribunal asserted jurisdiction and held under the applicable New Jersey statutes that the complaints were properly dismissed (R., pp. 287-302). This was recognized by the District Court upon the settlement of the order in that court pursuant to the mandate of the Circuit Court of Appeals (Appendices C and D, pp. 20-22, *infra*).

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* The above statement is based upon the following from plaintiff's brief in the Circuit Court; "* * * the plaintiff would welcome a decision in this Court upon the merits * * * If in the Court's opinion the complaint does not state a cause of action, the judgment will have to be affirmed even though the grounds assigned were wrong."

The Plan was submitted to and authorized by the stockholders in compliance with §§ 1 and 2 of Chap. 175 of the Laws of 1920 of the State of New Jersey (R., pp. 185, 198-199, 249; see Appendix B for the text of this statute). Thereafter and about the 1st of February, 1931, 535 employes, including directors who were active employes, were accorded by the Board of Directors the right to subscribe under the Plan to a number of shares at $25 par value per share, upon the terms and conditions described in an agreement (Exhibit G, R., pp. 91-130) between the Company, the respective employes, and Guaranty Trust Company of New York and Junius Parker—the latter two named as Trustees in the Agreement.

In early March, 1931, the Company mailed to each stockholder of record, accompanying the annual report and notice of the annual meeting of the Company, to be held on April 1, 1931, a pamphlet setting forth what had been done by the Company in carrying out the Plan, with a copy of the subscription agreement with employes and the trust agreement above mentioned, and stating the exact number of shares allotted to the President, the number allotted to the five Vice-Presidents, and the number allotted to each of the other 529 employes (R., pp. 201, 91-130). At about the same time the petitioner inserted advertisements in the newspapers seeking proxies and criticising the Plan (R., pp. 8-9, 202).

At that meeting on April 1, 1931, the stockholders, having been thus advised of such facts, re-elected the Board of Directors by the largest number of votes ever cast at any annual meeting in the Company's history (R., pp. 202-204) thus effectively approving the acts of the Directors.

Introductory Statement.

This cause involved the construction of a charter of a New Jersey corporation and of the following New Jersey statutes:

General Corporation Act, § 1 (P. L. 1896, Ch. 185, § 1) (*Powers of Corporation*).

General Corporation Act, §12 (L. 1896, Ch. 185, § 12) (*Powers of Directors*).

General Corporation Act, § 46 (L. 1896, Ch. 185, § 46) (*Three Stockholders can call meeting*).

General Corporation Act, § 47 (L. 1896, Ch. 185, § 47, as am'd.; L. 1901, Ch. 110, § 2, as am'd.; L. 1926, Ch. 318, § 14) (*Power of Directors respecting capital and dividends*).

General Corporation Act, § 121 (L. 1920, Ch. 168, § 1, as am'd.; L. 1921, Ch. 284, § 1, am'd.; L. 1926, Ch. 318, § 15, supplementing L. 1896, Ch. 185, am'd.; L. 1930, Ch. 120) (*Issuance and sale of shares*).

General Corporation Act, § 124 (L. 1926, Ch. 318, § 16) (*Rights of stockholders respecting new stock issued for cash*).

General Corporation Act, § 151 (L. 1917, Ch. 195, § 1) (*Issuance of stock for labor*).

General Corporation Act, §§ 158-158c (L. 1920, Ch. 175, §§ 1-4) (*Statute authorizing the Plan*).

The decisions of the New Jersey courts where those local statutes have been construed are in complete harmony with that of the Circuit Court of Appeals in the instant case; not one is adverse.

No Federal question is involved. The facts are peculiar to the instant case, which does not fall within any of the categories of Rule 38 of this Court. There is less reason for a review by this Court than there was in many of the stockholders' actions in which certiorari was denied by this Court. See *Harker* v. *Ralston Purina Co.*, 45 Fed. (2d) 929; certiorari denied, 284 U. S. 619; *Church* v. *Harnit*, 35 Fed. (2d) 499; certiorari denied, 281 U. S. 732; *Wallace* v. *Motor Products Corp.*, 25 Fed. (2d) 655; certiorari denied, 279 U. S. 859.

We shall confine this brief to an outline of the questions involved in the petitioner's so-called reasons, which will thus appear to be reasons for refusing, rather than for allowing, the writ.

I.

The first question is whether the proposition submitted to stockholders was a plan within the statute of New Jersey (L. 1920, Ch. 175).

The entire basis of Judge Swan's dissent was that the proposition submitted was merely a proposal, not a plan.

The petitioner says it was not a plan because discretion was conferred on the directors to select and rate the employes to to be allowed to participate.

The Plan will be found in the record at pages 40-42. For the convenience of the Court, we have annexed it hereto as Appendix A (pp. 13-15).

The New Jersey statute is printed as Appendix B hereto (pp. 16-19).

The majority of the Circuit Court of Appeals held that the Plan complied with the statute.

The statute is couched in the broadest terms and does not define or prescribe any requirements of a plan.

Its obvious purpose was to encourage and give legislative approval to the policy long since adopted by many corporations of giving special compensation to employes by selling them stock on favorable terms in order to secure the advantages of continuous service and increased loyalty.

It would be unreasonable to attribute to the Legislature an intention, not expressed in the terms of the statute, to require that a plan or proposal, to be in effect over a period of time and under changing business conditions, a specification of the details of the selection of employes to whom special compensation was to be awarded or of the terms under which the compensation would be paid and the plan administered.

No New Jersey case is cited, and none can be found, giving such a construction to the statute.

II.

The second question is whether it is a waste of corporate assets to allow employes, who subscribe for stock under an Employees' Stock Subscription Plan adopted by stockholders under a statute authorizing it, to pay therefor in cash to the par amount thereof and in services for any excess in value above par, directors who are also employes being allowed to participate.

The New Jersey statute (Appendix B, pp. 16-19) provided, not only for the issue of stock to employes, but also for "aiding any such employees in paying for such stock *by contributions, compensation for services, or otherwise.*"

The Plan adopted by stockholders authorized the allotment of stock for subscription, "by way of additional compensation for services to be rendered (Appendix A, p. 13) * * * at prices not less than the par value of the shares allotted" (*id.* p. 14) and provided inter alia "No employee or person actively engaged in the conduct of the business of the corporation, or its subsidiaries, shall be deemed ineligible to the benefits of the plan by reason of his being a director of the corporation or of any of its subsidiaries or of holding any office therein" (*id.* p. 15).

The subscription agreement provided for delivery of stock only upon payment of the par value in full, and in no event before December 31, 1931 (R., p. 113), and for the right of the Trustees to cancel in case of discharge or resignation before that date (R., p. 116).

The cases relied on by the petitioner, dealing with the general question of directors' and trustees' disqualification to deal with themselves, have no application. No New Jersey case is cited, and there is none, holding that participation of directors in an employes' stock subscription plan, if authorized by stockholders, is unlawful or a waste of corporate assets.

It is the law of New Jersey that a contract made between directors and their corporation, authorized by stockholders after notice of the directors' interest, is unassailable save for actual fraud or want of power. (*Hodge* v. *U. S. Steel Corporation,* 64 N. J. Eq. 807, 813-814).

III.

The third question is whether a stock subscription plan authorized by statute and adopted by a vote of 80 per cent. of all stockholders, and almost a unanimous vote of those present and voting at a meeting duly called for the purpose, is an invasion of the preemptive right of stockholders.

If so, every State statute authorizing employes' stock subscription plans, or the issuance of stock for property or services is invalid.

The preemptive right of a stockholder of a New Jersey corporation has never been held to be of a contractual nature. In its inception it was but the result of a rule of equity to preserve the proportionate interest of the stockholders in the voting rights and property of the corporation, and consequently the rule has always been confined to a sale of stock solely for cash and never been applied to stock issued in whole or in part for either property or services.

The New Jersey Courts have expressly held that "the right of stockholders to participate in an increase in the capital stock of the corporation is purely statutory and subject to modification or repeal by the legislature." *Bingham* v. *Savings Investment & Trust Co.,* 102 N. J. Eq. 302, 306.

The New Jersey statute of 1926, cited by petitioner, conferred that statutory right upon a stockholder for the first time in New Jersey; but this later Act did not purport to repeal or modify in any way the provisions of the earlier Act of 1920 under which the Plan was authorized.

Scott v. *Lorrillard Co.*, 108 N. J. Eq. 153; aff'd, 109 N. J. Eq. 417, relied on by the petitioner, involved an issue of stock to a particular group of stockholders not made under the authority of the Act of 1920, not having any relation to services, but based entirely on the ownership of their shares.

IV.

The fourth question is whether the Charter provision of a New Jersey corporation, empowering directors to set aside reserves and apply them in the purchase of property, limits the directors to the use of corporate funds either (1) to acquire property or (2) to pay dividends.

The instant case involves the issue of stock, not the application of earnings, but, even assuming the latter to be involved, the New Jersey cases, as well as common sense, are against the petitioner.

The allotment of stock under the Plan was in part payment for services—as a part of the expenses of the business. There could be no profits until the expenses were paid. *Bennett* v. *Millville Improvement Co.*, 67 N. J. L. 320; *Booth* v. *Beattie*, 95 N. J. Eq. 776; affd. 95 N. J. Eq. 776.

V.

The fifth question is whether Equity Rule 27 is applicable.

One of the grounds for dismissal stated in the majority opinion of the Circuit Court of Appeals was that petitioner had failed to comply with Federal Equity Rule 27. It is clear from the opinion that this was an alternative ruling and that since the Plan was wholly valid, under New Jersey law, the decision of the case would have been the same, even if there had been compliance with Rule 27.

Petitioner relies upon the dissenting opinion in the Circuit Court of Appeals. But, the only justification advanced in that opinion for petitioner's failure to appeal to the stock-

holders before bringing suit was that such action was unnecessary because in the view of the dissenting judge the issue of stock was *ultra vires* and void for failure to comply with the statute.

The majority opinion in the court below holds that the stock was validly issued.

It is clear that the instant controversy presented a clear case for the application of the Rule.

The petitioner does not claim that he has attempted to secure action of the stockholders or that the directors constitute or control a majority of stockholders or anything like a majority. *United Copper Co.* v. *Amalgamated Copper Co.*, 244 U. S. 261; *Wathen* v. *Jackson Oil Co.*, 235 U. S. 635; *Stone* v. *Holly Hill Fruit Products*, 56 Fed. (2d) 553.

Such recourse was available to petitioner.

The statute (Appendix B, p. 19) provides: "Any plan adopted * * * may be recalled, abolished, revised, amended, altered or changed in the same manner as is herein provided for its adoption."

The Plan itself provided for its recall, abolition, revision, amendment, alteration or change by the stockholders (Appendix A, p. 15).

Section 46, Chap. 185 of the Laws of 1896 of New Jersey, provides that three stockholders having voting power may call a stockholders' meeting and such meeting is a legal meeting for all purposes.

VI.

The sixth question is whether the statute authorizes subscriptions for stock to be paid for in cash to the par amount thereof and by services to be rendered for any excess in value above par.

Again the petitioner cites no New Jersey case which he claims is opposed to the ruling of the majority of the Circuit Court of Appeals. There is none.

The Company received par $25 per share from the Guaranty Trust Company, the trustee under the agreement, for each share of stock issued under the Plan.

We have shown under II that the subscription agreement provides for cancellation in case of dicharge or resignation before the date fixed for issue of the stock. The agreement then is a contract for the payment for services in part in stock, to be cancelled if the services are not rendered. *Vineland Grape Juice Co.* v. *Chandler,* 80 N. J. Eq. 437.

The statute under which the Plan was authorized permits the stock to be issued without payment in full at the time of issue: "The issue * * *, and the payment for such stock in instalments or at one time, with or without the right to vote thereon, pending payment therefor in full * * *."

We have also shown under II that the statute authorizes aid to employes by *"contributions, compensation for services, or otherwise."*

The petitioner cites § 151* of the General Corporation Laws of New Jersey authorizing stock to be issued "for labor performed."

That would be ample authority for the issue complained of, but in truth that issue was made under the Act of 1920 (Appendix B), not under said § 151.

VII.

In his number 7 petitioner refers to earlier plans. We are unable to perceive what question even the petitioner thinks is presented, that ought to be reviewed by this Court.

Apparently petitioner wants the Court to know that there were earlier plans, which are the subject of other pending actions, but as to which no relief is asked in this suit.

* Petitioner, actually cites § 46 but that is obviously an error as that section deals with the right of three stockholders to call a meeting.

VIII.

The eighth question is whether the participation of employe directors under the Plan voids the Plan, notwithstanding approval by the stockholders, with notice that directors would be permitted to participate. This is involved in petitioner's reason No. 2, and what was said in answer thereto applies equally here.

On June 25, 1930, when the Board voted that it deemed it advisable to submit the Plan to the stockholders, no director could know that two-thirds of the stockholders would approve the Plan. No director voting for the resolution was dealing with himself.

We have referred in II to the provisions of the notice that "no employee or person * * * shall be deemed ineligible to the benefits of the plan by reason of his being also a director of the corporation * * * or holding any office therein" (R., p. 49).

In the case of *Barrett* v. *Bloomfield Savings Institute,* 64 N. J. Eq. 425, cited by petitioner, the question of independent majority stockholders authorizing the action of directors to treat with themselves, was not present nor do any of the other authorities cited by petitioner under this Point apply to the case at bar.

IX.

The refusal of Judge Patterson to assert jurisdiction is no longer in the case, since at the petitioner's request the Circuit Court of Appeals assumed jurisdiction and decided the case on the merits.

Petitioner urges as an additional ground for certiorari the refusal of the District Court to take jurisdiction in the first instance (Pet., pp. 30-32). It is clear from both the majority opinion (R., pp. 287-297) and the dissenting opinion (R., pp. 297-302) that the Circuit Court of Appeals assumed jurisdiction of the cause and decided the issues on the merits. (Apndx. C and D, pp. 20-22, *infra.*) Consequently, even if it were proper for petitioner now to complain that the Circuit Court—in the hearing *de novo* accorded in such equity

cases—assumed the very jurisdiction he requested it to take, this Court would concern itself solely with the question whether the dismissal of the complaints was proper under the applicable New Jersey law.

Whether the District Court should have taken jurisdiction was a matter of discretion. But whether that discretion was properly exercised (which is immaterial and of no importance on the present application) there can be no doubt that these actions involve only questions of local New Jersey law.

The crux of the cause is to nullify a Plan authorized under a New Jersey statute (L., N. J., 1920, Chap. 175) and to cancel stock issued thereunder. The Charter of a New Jersey corporation and the series of New Jersey statutes referred to (pp. 3-4, *supra*), the complex provisions of which are interrelated and which are, of course, applicable only to New Jersey corporations, are involved. The controversy is clearly a local one which presents no Federal question.

Conclusion.

The present cause presents no issue as to which this Court should exercise its discretionary power of review. These actions represent merely an attempt to interfere with the internal management of a New Jersey corporation engaged in a nation-wide business, the corporate affairs of which were subject to and governed by the local statutes. The facts are wholly individual and unique. No question of federal jurisdiction or of general law is presented, nor is there any conflict of decisions to be resolved. Review of the final decision in the present case is no more warranted than would be the review of any one of many stockholders' suits constantly being brought.

The petition should be denied.

Respectfully submitted,

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APPENDIX A

Employees' Stock Subscription Plan.

I. Purpose.

The purpose of this Plan is to accord to such employees of The American Tobacco Company (herein called the "Corporation") and its subsidiaries, and to those actively engaged in the conduct of its or their business, as may be selected as herein provided, by way of additional compensation for services to be rendered, an opportunity to purchase shares of the stock of the Corporation.

II. The Plan.

The Plan is to allot for subscription, in the manner and upon the conditions herein provided, by way of additional compensation for services to be rendered, shares of the unissued Common Stock B of the Corporation which may be authorized by amendment to the Certificate of Incorporation of the Corporation voted at the same meeting of stockholders at which this Plan may be approved, to such of the employees of the Corporation and/or its subsidiaries and those actively engaged in the conduct of its or their business as may be selected as hereinafter set forth; provided, however, that there shall at no time be any issuance of shares under this Plan, when the effect of such issuance would be to increase the total number of shares of Common Stock and Common Stock B issued and outstanding above an aggregate of five million shares.

III. Execution of the Plan.

The Board of Directors may, at such time or times as it may determine, by way of additional compensation for services to be rendered, offer and allot such stock for subscription, to employees of the Corporation, and/or its subsidiaries,

and to those actively engaged in the conduct of its or their business, in such amounts and proportions, to such persons, at such prices not less than the par value of the shares allotted, payable in full or in such installments, and upon such other terms and conditions, all as shall be determined with respect to each offering of stock to each individual pursuant to authority to be granted by the Board of Directors to the President for such purpose.

IV. Rights of Subscriber Prior to Payment.

No stock shall be delivered until such stock has been fully paid for. The Board of Directors, however, may provide that subsequent to subscription for said stock and prior to the time the full subscription price has been paid, the subscribers shall possess such voting (if any) and other rights pertaining thereto, including the right to receive dividends thereon and to subscribe to any new issue of stock by the Corporation, that may be permitted to other holders of Common Stock B of the Corporation. Any and all payments accruing to any such subscriber, by way of dividend or otherwise, prior to the full payment for his stock shall be credited to the subscriber on account of the payments agreed to be made by him in the purchase of said stock, and shall not be paid directly to such subscriber until full payment for his stock has been made.

V. General Conditions.

The Board of Directors may attach to each offering of stock such detailed conditions governing the cancellation and withdrawal of subscriptions and refund of payments and the handling of the same in case of death, disability or pensioning of employees, temporary suspension of employment, permanent discharge or leaving service, or providing for other special situations, in such manner as it shall deem reasonable and appropriate and best calculated to effectuate

the purposes of this Plan; provided that in no event shall any amounts paid in be forfeited; and in case of cancellation or withdrawal, all such amounts shall be returned with interest at such rate, not to exceed Six Per Cent. (6%) per annum, as the board of Directors may determine. No employee or person actively engaged in the conduct of the business of the Corporation, or its subsidiaries, shall be deemed ineligible to the benefits of the Plan by reason of his being also a director of the Corporation or of any of its subsidiaries or of holding any office therein.

VI. Recall or Amendment.

This Plan may be recalled, abolished, revised, amended, altered or changed, as provided in Section 3 of Chapter 175 of the Laws of the State of New Jersey for the year 1920.

APPENDIX B

Statute Under Which the Plan Was Authorized.

158. Power of domestic corporation to provide for participation of employees in purchase of stock, profits, welfare work or management.

Any stock corporation formed under any law of this state may, upon such terms and conditions as may be determined in the manner hereinafter designated, provide and carry out a plan or plans for any or all of the following purposes:

(a) The issue or the purchase and sale of its capital stock to any or all of its employees and those actively engaged in the conduct of its business or to trustees on their behalf, and the payment for such stock in instalments or at one time with or without the right to vote thereon pending payment therefor in full, and for aiding any such employees and said other persons in paying for such stock by contributions, compensation for services, or otherwise.

(b) The participation by all or any of its employees and such other persons in the profits of the corporate enterprise or of any branch or division thereof. Such share in such profits shall be regarded as a part of the corporation's legitimate expenses.

(c) The furnishing to its employees wholly or in part at the expense of such corporation of medical services, insurance against accident, sickness or death, pensions during old age, disability or unemployment, education, housing, social services, recreation or other similar aids for their relief or general welfare.

(d) The nomination and election by its employees of one or more thereof as a member or members of its board of directors, such member or members to have the same rights and authority and be subject to the same duties and respon-

sibilities as the directors to be elected by the stockholders. Every such corporation may determine and provide the manner of making any such nominations and calling and conducting any such election, the time or times, the place or places where it shall be held, what number of years of service or other qualifications shall entitle its employees to one or more votes, whether said votes shall be cast personally or by proxy, what number of votes shall be required to elect, and such other restrictions and conditions as may be deemed expedient and proper; *provided, however,* that the voting at all such elections shall be by secret ballot, and that if less than a majority of employees entitled to vote participate in the election, such election shall be inoperative and void. Any vacancy occurring in any such office by reason of a failure to elect or otherwise, shall be filled in the manner provided for in the plan, and in the absence of such provision such vacancy shall be filled from among the employees or stockholders by the board of directors. (L. 1920, ch. 175, p. 354, § 1; S. 47-183.)

158a. Manner of exercising privileges and powers granted by preceding section.

Any of the privileges and powers hereinbefore granted may be exercised in the manner following:

(a) By including appropriate clauses therefor in the original articles of incorporation or by-laws at the time of organizing the corporation.

(b) Where the corporation has been formed without the said charter or by-law provisions the board of directors shall first formulate such plan or plans and pass a resolution declaring that in its opinion the adoption thereof is advisable, and shall call a meeting of the stockholders to take action thereon. The stockholders' meeting shall be held upon such notice as the by-laws provide, and in the absence of such provision upon ten days' notice given personally or by

mail. If two-thirds in interest of each class of stockholders present at said meeting and voting shall vote in favor of any such plan or any modification thereof, the said plan shall thereupon become operative.

(c) In case any corporation shall hereafter adopt a plan providing for the issue of new stock under subdivision (a) of section 1 of this act, or any plan provided for in subdivision (d) of such section 1, any stockholder holding stock issued by such corporation before the enactment of this law, not voting in favor of such plan, may, within thirty days after the adoption thereof, file with the secretary of the company a dissent in writing therefrom. The person so dissenting shall within ten days after the filing of such dissent, and upon five days' notice to the corporation, apply by petition to the Circuit Court of the county in which the corporation has its principal office for the appointment of three disinterested appraisers to appraise the fair value of the stock held by such stockholder in said corporation and issued prior to the enactment of this law without regard to any depreciation or appreciation thereof in consequence of the adoption of such plan, whose award (or that of a majority of them) when confirmed by the said court, shall be final and conclusive on all parties, and said corporation shall pay to such stockholder the value of such stock as aforesaid. On receiving such payment, or on a tender thereof, or in case of any legal disability or absence from the state, on the payment of such award into said court, said stock shall be transferred to the said corporation, to be disposed of by the directors thereof or to be retained for the benefit of the remaining stockholders; and in case the said award is not paid within thirty days from the filing of said award and confirmation by said court and notice thereof to be given in the manner aforesaid unto such corporation, the amount of the award shall be a judgment against said corporation, and may be collected as other judgments in said court are by law collected. Such

court may fill any vacancy in the board of appraisers occurring by refusal or neglect to serve or otherwise. The charges and expenses of the appraisers and appraisal as approved by the court shall be paid by the corporation; *provided, however,* that the corporation may at any time before the proceedings hereinbefore mentioned are instituted or completed elect to permit such dissenting stockholder to subscribe for his proportionate share of such new stock issued under section one, subdivision a, in which event the said proceedings shall not be instituted, or, if instituted, shall be terminated upon the payment of the appraisal expenses as aforesaid by the corporation. (L. 1920, ch. 175, p. 355, § 2; S. 47-184.)

158b. Change or abolishment of plan adopted; restoration of moneys to employees.

Any plan adopted as aforesaid may be recalled, abolished, revised, amended, altered or changed in the same manner as is herein provided for its adoption; subject, however, to the restoration by the corporation of any moneys contributed by the employees or those actively engaged in the conduct of the corporate business, and for which no stock or other equivalent has been issued. (L. 1920, ch. 175, p. 357, §3; S. 47-185.)

158c. Privileges and powers conferred by act in addition to other powers and authority.

The privileges and powers conferred by this act shall be deemed to be in addition to and independent of any and all powers and authority conferred by any other law or laws, and not in restriction or limitation of any of the powers now permitted to corporations of this state. (L. 1920, ch. 175, p. 357, §4; S. 47-186.)

APPENDIX C

Opinion of Patterson, D. J., Upon Settlement of Order.

RICHARD REID ROGERS, *Plaintiff,* against GUARANTY TRUST COMPANY OF NEW YORK, JUNIUS PARKER, GEORGE W. HILL, et al., *Defendants.*	Consolidated Cause. E—59-307.

MEMORANDUM.

PATTERSON, D. J. The opinion of the Circuit Court of Appeals must be consulted to ascertain what was intended by the mandate. The opinion shows that a majority of the court held that for several reasons there was no equity in the bill. In conformity with such decision, the decree now to be entered will be a dismissal of the bill with a provision for $25 costs, as specified in the mandate.

(Sgd.) ROBERT P. PATTERSON,
U. S. D. J.

July 8, 1932.

APPENDIX D

Order Entered on Mandate.

At a Stated Term of the United States District Court for the Southern District of New York, held at the Post Office Building, in the Borough of Manhattan, City of New York, on the 11th day of July, 1932.

Present—Hon. ROBERT P. PATTERSON, District Judge.

RICHARD REID ROGERS, *Plaintiff,* against GUARANTY TRUST COMPANY OF NEW YORK, JUNIUS PARKER, GEORGE W. HILL, C. F. NEILEY, A. C. MOWER, VINCENT RIGGIO, CHARLES A. PENN, J. B. HARVIE, R. J. BOYLAN, C. S. KEENE, J. K. FLETCHER and THE AMERICAN TOBACCO COMPANY, *Defendants.*	Consolidated Cause. E—59-307.
RICHARD REID ROGERS, *Plaintiff,* against THE AMERICAN TOBACCO COMPANY and T. R. TAYLOR, *Defendants.*	

A decree in the above-entitled consolidated cause having been entered in this Court on the 23rd day of February, 1932, in favor of the defendants Guaranty Trust Company of New York, Junius Parker, George W. Hill, Vincent Riggio, J. B. Harvie, R. J. Boylan, T. R. Taylor, and The American

Tobacco Company, denying plaintiff's motion for an order to strike out the first, second, third, and fourth separate defenses of the answer therein, and for a decree in accordance with the prayer of the amended bill of complaint therein, or, in the alternative, for an order for an injunction *pendente lite,* the said decree having dismissed each of the bills of complaint therein without prejudice to the enforcement of the rights of plaintiff, if any, in the courts of New Jersey, and plaintiff having taken an appeal from the said decree to the United States Circuit Court of Appeals for the Second Circuit, from which a mandate has duly issued to this Court affirming said decree of this Court, and it appearing from the decision of the said Circuit Court of Appeals that the said cause was adjudicated by said Circuit Court of Appeals in favor of the said defendants on the merits, it is hereby

ORDERED, that the defendants Guaranty Trust Company of New York, Junius Parker, George W. Hill, Vincent Riggio, J. B. Harvie, R. J. Boylan, T. R. Taylor and The American Tobacco Company have judgment against the plaintiff Richard Reid Rogers that each of the bills of complaint herein be and the same is hereby dismissed with $25 costs, which costs will be fixed by the Clerk against the said plaintiff, and for which, if not paid in ten days, execution will issue upon the application of any party in interest.

ROBERT P. PATTERSON,
U. S. D. J.

FILE COPY

DEC 7

CHARLES ELMORE

Supreme Court of the United States

OCTOBER TERM, 1932.

No. 327.

[redacted]

Consolidated Cases.

BRIEF ON BEHALF OF RESPONDENTS

JOHN W. DAVIS,
NATHAN L. MILLER,
Counsel for Respondents.

CORPORATE PRESS, INC., NEW YORK CITY

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Supreme Court of the United States

OCTOBER TERM, 1932.

No. 227.

RICHARD REID ROGERS,
Petitioner,
against
GUARANTY TRUST COMPANY OF NEW YORK, JUNIUS PARKER, GEORGE W. HILL, VINCENT RIGGIO, J. B. HARVIE, R. J. BOYLAN, and THE AMERICAN TOBACCO COMPANY,
Respondents,
and
C. F. NEILEY, A. C. MOWER, J. K. FLETCHER, CHARLES A. PENN (Deceased), and C. S. KEENE (Deceased),
Defendants,

RICHARD REID ROGERS,
Petitioner,
against
THE AMERICAN TOBACCO COMPANY and T. R. TAYLOR,
Respondents.

Consolidated Cause.

BRIEF ON BEHALF OF RESPONDENTS

Preliminary Statement.

These suits in equity originated in the New York Supreme Court. Plaintiff,* a holder of record of 200 shares of Common Stock and 400 shares of Common Stock B out of 4,688,000 common shares outstanding of The American Tobacco Company, a New Jersey corporation (hereinafter called the "Company"), seeks (1) to obtain cancellation of stock issued pursuant to an Employees' Stock Subscription Plan (hereinafter called "Plan"); (2) to nullify the agreements under which those shares had been allotted to 535 em-

* We shall designate petitioner as plaintiff and respondents as defendants.

ployes of the Company; and (3) to enjoin the execution of the Plan (R., pp. 12, 181, 35-36, 40-42, 131-153).

That Plan was duly authorized by the Company's stockholders pursuant to Sections 1 and 2 of Chapter 175 of the Laws of 1920 of New Jersey* at a special meeting held on July 28, 1930 (R., pp. 198-199, 253-256).

The defenses set up in the answer, are:

(1) Plaintiff has failed to comply with Equity Rule 27 (R., pp. 198-200).

(2) The stockholders of the Company, including plaintiff, have ratified the action of the Board with respect to the allotments made to Directors under the Plan (R., pp. 200-204).

(3) The action is an attempt to regulate the internal affairs of a corporation foreign to the State of New York, of which the United States District Court for the Southern District of New York should decline to take jurisdiction (R., pp. 204-5).

(4) The amount of the compensation paid to the individual defendants, including the benefits under the Plan, was and is fair and reasonable; under the By-Laws of the Company the Directors had the right to fix the compensation of its agents; the allotments under the Plan were in accordance therewith as well as in accordance with the New Jersey statutes (R., pp. 205-232).

After joinder of issue, plaintiff made a motion to strike out the defenses, for judgment *pro confesso,* or, in the alternative, for an injunction *pendente lite* (R., pp. 3, 4-7).

The District Court denied that motion and, in the exercise of its discretion, dismissed the bills of complaint, without prejudice to plaintiff's instituting an action in New Jersey (R., pp. 273-279), for the reason that the case involved the internal management of a foreign corporation, sought can-

* See Appendix A for the text of this Statute, *infra,* pages 54-57.

cellation of an issue of its stock and turned largely upon the construction of a number of New Jersey statutes. The District Court said in part:

> "the validity of the shares sought to be cancelled depends primarily upon the interpretation and effect of the Act of 1920. * * * In addition, plaintiff submits that two other statutes, that of 1917 and that of 1926, must be taken as limiting the operation of the 1920 act. It is obvious that the case presents not merely questions of fact but questions of some complexity under the New Jersey laws. There seem to be no decisions of the New Jersey courts to serve as a guide in the proper construction and possible interrelation of these statutes. The legality of the corporate proceedings which resulted in the issuance of this stock is peculiarly a matter for determination in the first instance by the New Jersey courts"* (R., p. 278).

Plaintiff appealed from the order of the District Court to the Circuit Court of Appeals where he sought final disposition of the case as he does here. Plaintiff did not assign as error to the Circuit Court of Appeals the denial of his motion to strike out and for judgment *pro confesso* (R., pp. 283-4). The Circuit Court of Appeals, by the majority

---

* Plaintiff asserts, at page 31 of his brief, that the defendants, in opposing the petition for a writ of certiorari by this Court, took the position that the question of discretionary jurisdiction was out of the case.

To reach that conclusion, plaintiff quotes from only part of a sentence, appearing on pages 11-12 of defendants' brief on certiorari, which quotation, standing by itself, distorts the meaning of the complete paragraph and permits of a perversion of its actual purport.

In the paragraph of defendants' brief, from which plaintiff has quoted an excerpt, defendants were urging that, because plaintiff had requested the Circuit Court of Appeals to consider this cause on its merits—and that Court had done so—plaintiff was not in a position to attack Judge PATTERSON'S ruling as a ground for granting certiorari by this Court.

Defendants, in their brief in opposition to certiorari, contended that the refusal to exercise jurisdiction by the District Court was a matter of discretion. The defendants have pleaded, as a defense, that the Court should refuse to exercise jurisdiction (R., pp. 204-5). They argued the jurisdictional question at length in their brief before the Circuit Court of Appeals. They are, of course, entitled to present that question in this Court in support of the dismissal of the complaint.

opinion, asserted jurisdiction and held, under the applicable New Jersey statutes, that the complaints were properly dismissed for the following reasons:

(1) The Plan complied with the New Jersey statute and was legally adopted (R., p. 292).

(2) The stockholders had given express consent that the directors (if employes) might participate in the Plan and that the directors should act in fixing such participation (R., pp. 292-3).

(3) The fact that the Plan, if approved by the necessary vote of stockholders, would permit the directors to participate therein (providing they were employes), did not disqualify the directors from submitting the Plan to the stockholders as authorized by the statute (R., p. 293).

(4) The stock allotted under the Plan was lawfully issued for cash and services to be rendered; the Company received the benefit of those services (R., p. 293).

(5) The Company's charter did not prohibit it from issuing stock at its par value and as compensation to employes and officers under the Plan (R., p. 293).

(6) The statute does not prohibit, but, on the contrary, permits the allotment of stock to employes at less than the market price; the stockholders, in approving the Plan, authorized the allotment of the stock at a price below the market as additional compensation to the Company's employes (R., p. 294).

(7) Plaintiff failed to comply with Equity Rule 27 (R., p. 295).

The dissenting Judge based his dissent solely upon (1) a proposition which had never theretofore been raised or suggested by plaintiff, namely, that the Plan was not sufficiently detailed to constitute a plan within the meaning of the statute and (2) therefore Equity Rule 27 did not apply.

The District Court entered a decree* dismissing the complaints on the merits, in accordance with the majority opinion of the Circuit Court of Appeals.

The Company's Success Under the Defendants' Management, Which Actuated the Stockholders in Approving the Plan.

The Plan attacked by the plaintiff was submitted to the stockholders and approved by them, for the avowed purpose of giving liberal additional compensation through the issuance and sale of common stock to employes including those who were directors, and "those who were actively engaged in the Company's business," who had made an outstanding success of the Company's business in the face of the most severe competition and extremely adverse business conditions.

The principle underlying this Plan is that the greatest efforts, efficiency and loyalty, will be obtained by the Company if a compensation in addition to a fixed compensation is held out to the men in places of responsibility; compensation of such a nature as to make them feel that they are part owners of the business and that their personal success and prosperity are measured by the success and prosperity they achieve for the Company and its stockholders (R., p. 237). This has been a principle of administration of the Company, conceived early in its history and fully justified by the event (R., p. 237).

The complexity of the Company's activities and the extent of its operations are set forth in the record (R., pp. 205-232).

From 1912,—when the Company was divested of a great part of its business by the decree of this Court (*U. S.* v. *American Tobacco Co.*, 221 U. S. 106),—until 1925, due to competition with other tobacco companies, the cigarette business of the Company had decreased from 37.11% of the national business of all cigarette manufacturers

* Appendix B, *infra*, pages 58-59.

in 1912 to 21.80% in 1925 (R., pp. 205-208). In December, 1925, defendant Hill became President of the Company. Under his management, and in cooperation with the late defendant Penn and other directors, most of whom were employes of the Company, a completely new and different policy was inaugurated in all departments. As a result, the Company increased its sales of "Lucky Strike" cigarettes so that they rose from 20.14% of the national total of all cigarettes sold in 1926 to 38.10% in 1930* (R., p. 208).

In 1930 the total increase over 1929 in cigarettes of all kinds sold in this country was approximately half a billion, whereas the increase in the sale of "Lucky Strike" cigarettes (the Company's product) was over six billion. Therefore, the Company's increase was at the expense of its competitors to the extent of five and a half billion cigarettes (R., p. 236).

The same remarkable growth occurred both with respect to the earnings of the Company and the dividends paid on its Common Stock. In 1926, the first year under defendant Hill's management, the net earnings, after deducting all expenses for management, taxes, and depreciation, were $22,549,094, and the dividends paid were $15,622,486 (Exh. G,** R., p. 96).

In 1930 the Company's net earnings, after deducting all charges and expenses for management, taxes and depreciation, amounted to $43,294,769. It paid dividends on its Common Stock of $29,294,000 (R., p. 96).†

It was with this record of achievement in mind that the stockholders acted in giving approval to the Plan.

---

* The Company sold nearly 37,000,000,000 of its "Lucky Strike" cigarettes in the United States in 1929 and 43,212,000,000 in 1930 (R., p. 219). It sold in excess of 300,000,000 of its "Cremo" cigars in 1930 (R., pp. 216, 219).

** All exhibits are annexed to and made part of the complaint.

† The Federal Taxes paid by the Company in 1930 exceeded $150,000,000 (R., pp. 178, 195, 236).

The Result of the Operations of the Company for 1931.

The stock was allotted under the Plan in January, 1931, in part consideration for services to be rendered during the balance of the year. The results of the year's operations demonstrated the benefits to the Company from the stimulation of the efforts of the management and other important employes by the Plan. In the first ten months of 1931 the Company's sales of "Lucky Strike" cigarettes in the United States increased by 2,395,000,000 over the corresponding period of 1930, whereas the sales of its competitors' cigarettes decreased in that period by 4,479,000,000 (R., p. 236). The sale of its Cremo cigars increased from 90,000 a day in 1929, to more than 2,000,000 per day in 1931 (R., pp. 216, 219). The English branch of the Company's business in cigarettes mounted from 365,000 per day to over 12,000,000 per day (R., p. 213). In the first eleven months in 1931 the Company did a greater volume of business and made a greater profit for its stockholders than it had during the corresponding period of 1930 (R., p. 234). It paid an extra dividend of $1.00 per share in March of 1931, and the total dividends paid upon its Common Stock up to December of that year (one of unprecedented business depression) exceeded $28,300,000 (R., p. 209).

The Plan—Its Authorization.

On June 25, 1930, the directors held a meeting in accordance with the provisions of Section 2 of Chapter 175 of the Laws of 1920, at which they authorized the submission of the Plan and a proposed change in capital structure to the Company's stockholders (R., pp. 12, 44-46, 182).

The Plan provided:

> (i) For according to such employes of the Company and its subsidiaries and to those actively engaged in the conduct of its or their business, as might

be selected in accordance with the Plan, an opportunity to purchase shares of the Company's stock, by way of additional compensation for services to be rendered (R., p. 40).

(ii) That the Company's board of directors might at such time or times as it may determine, by way of additional compensation for services to be rendered, offer and allot such stock for subscription, in such amounts and proportions, and at such price, not less than the par value of the shares allotted, payable in full or in such instalments, and upon such other terms and conditions as should be determined pursuant to the authority granted by the board to the president for such purposes (R., pp. 40-41).

(iii) No person was disqualified because of being a director of the Company or any of its subsidiaries (R., p. 42).

(iv) The Plan could be recalled, abolished, revised, amended, altered or changed as provided in Section 3 of Chapter 175 of the Laws of the State of New Jersey for 1920 (R., p. 42).

The Plan was duly adopted in strict compliance with Sections 1 and 2 of Chapter 175 of the Laws of 1920 of the State of New Jersey at the special stockholders' meeting of July 28, 1930 by a vote of 389,553 shares Preferred, 620,086 shares Common, and 1,218,849 shares Common B (R., pp. 185, 198-199, 249). Plaintiff appeared at the stockholders' meeting by a representative and read and filed a statement opposing the adoption of the Plan on practically the same grounds as those which he now urges, and voted his stock against it (R., pp. 14-15); but he stood virtually alone there, as he stands alone now in opposition to the Plan, as only 170 shares Common, 1,995 shares Common B, and 10 shares Preferred voted against the Plan (R., p. 249). Over 80 per cent. of the outstanding stock and more than 99.99 per cent. of that

which was present in person or by proxy authorized the Plan.

At the same meeting, the stockholders duly authorized a reduction in the par value of the Common Stock and Common Stock B from $50 to $25, and an increase in the number of shares of Common Stock from 1,000,000 to 2,000,000 and Common Stock B from 2,000,000 to 4,000,000, each stockholder receiving two shares of the new stock for one of the old (R., pp. 12, 182, 253-255).

The Company's stock was widely distributed and its control was in the hands of the public. The Company then had and now has over forty thousand stockholders (R., p. 238). While the Act required the consent of two-thirds of all classes of stock for the approval of the Plan, the directors collectively did not own or control at any time anything like a majority of the stock (R., p. 200) to say nothing of two-thirds. It was inherent in the Plan, as well as in the Act, that the Plan had to be authorized by the stockholders; and the latter were clearly advised that directors who were active employes were eligible to its benefits (R., p. 49).

After the increase of common stock authorized at such meeting, the prosperity of the Company enabled it to institute immediately, and pay regularly thereafter, regular dividends on each share of common stock old and new at the rate of $5 per annum, in addition to an extra dividend of $1 a share annually, so that the dividends paid to the Company's common stockholders in the first eleven months of 1931 exceeded $28,300,000, as against $15,622,486 paid in the entire year of 1926 (R., pp. 96, 209).

While plaintiff had the right—if dissatisfied because of the adoption of the Plan—to have his stock appraised and to be paid such appraised value (Section 2, Chapter 175), he did not avail himself of this right.

The Unique Services Rendered by the Defendants and the Responsibility Imposed Upon Them.

To maintain the Company's present success and position of preeminence in the tobacco industry, and the resulting profits and returns to its stockholders, requires an organization possessing the highest degree of alertness, ability, loyalty and originality (R., pp. 234-236), all of which are present in the Company's management. A striking example is the creation of the "Lucky Strike" cigarette, which was conceived and launched by the defendants Hill and the late Penn and is the chief product of the Company and the one from which it has made its greatest success (R., pp. 210-211). Many other similar outstanding achievements are shown in detail in the record (R., pp. 210-232).

There is imposed upon the defendants the responsibility of the many departments that constitute the Company, including the purchasing of leaf tobacco, purchasing of supplies, manufacturing, foreign operations, advertising and sales (R., pp. 210-232).

Routine and cursory services would be wholly inadequate to serve the interests of the Company. The stupendous task of the management is manifest from the number of articles that must be manufactured and sold each day, including over 150,000,000 of its "Lucky Strike" cigarettes and 2,000,000 of its "Cremo" cigars. The profit on each cigarette and cigar is but a fraction of a cent, so that the slightest variation of cost may result in a loss instead of a profit (R., pp. 235-237).

The Allotment of Stock Under the Plan.

Following the stockholder's approval the Company's board of directors at a meeting held on January 28, 1931, evolved a formula* for the allotment of stock

* This formula is discussed in detail at pages 35-36, *infra*.

under the Plan. Under the formula the compensation paid to each participant for the year 1930 was the general measuring rod in allotting stock under the Plan. The maximum allotment to any participant was limited to an amount of stock having a par value equal to one-third of his compensation for the year 1930. To allow for variations of efficiency and ability, each participant was to be given a rating upon a percentage basis in comparison with a key man in the same department. The actual number of shares to be allotted to each participant was arrived at by applying such percentage to one-third of the compensation received by the participant for the year 1930.

The board thereupon submitted to the President a list of employes who were considered by the board to be entitled to participate under the Plan, and also recommended that the defendants Hill and the late Penn (neither of whom was present at the meeting) each be given a rating of 100% (R., pp. 188-189).

At a subsequent meeting, the board accorded 535 employes, including directors who were active employes, the right to subscribe to a fixed number of shares at the par value of $25 per share, in addition to their services until December 31, 1931, upon the terms and conditions described in an agreement (Exh. G) between the Company, the respective employes, and Guaranty Trust Company of New York and Junius Parker—the latter named as Trustees in the agreement. The number of shares allotted to each participant was determined in accordance with the formula. Under the agreement the stock certificates could not be delivered to any subscribing allottee until the purchase price, and all interest accrued thereon, should be paid in full; but, in any event, not until after December 31, 1931. *If before that date any allottee should resign or be discharged, the Trustees had the power to cancel forthwith any right of such allottee under the agreement to have delivery of the stock* (Exh. G, R., pp. 91-130).*

*All italics in this brief are ours unless otherwise indicated.

The Allotments of Stock Reported to Stockholders Prior to the Annual Meeting of April 1, 1931.

The Company, on January 28, 1931, announced through the newspapers that its directors had voted to allot to employes, including directors who were employes, 56,712 shares of the Company's Common Stock B pursuant to the authority conferred upon them under the Plan (R., pp. 200-201). In early March, 1931, the Company mailed to each stockholder of record, accompanying the annual report and notice of the annual meeting of the Company to be held on April 1, 1931, a pamphlet (Exh. G) setting forth what had been done by the Company in carrying out the Plan, with a copy of the subscription agreement with allottees and the trust agreement above mentioned, and stating the exact number of shares allotted to the President, the number allotted to the five Vice-Presidents, and the number allotted to each of the other 529 employes (R., pp. 201, 91-130).

Prior to this annual meeting of April 1, 1931, plaintiff inserted in the newspapers an advertisement in which he voiced his criticism of the Plan, as well as of other payments made, and of the Company's management (R., pp. 202, 8-9).

Plaintiff stated in that advertisement:

> "But in the meantime, I do not know whether the stockholders desire to *approve even indirectly* these exorbitant payments, whether as salaries or as gifts; or whether they are disposed to approve a trend in corporate management in this country which is or may prove pernicious.
>
> "I advise the stockholders, therefore (whom I am unable to reach in any other way), who do not approve of this policy, not to send in their proxies to Mr. Hill, but either to appear in person or give their proxies to someone who will not vote approval. While I am not personally seeking proxies, I will state that any

> proxies sent to me will be voted against approval of these salaries, bonuses or gifts. Later proxies will cancel earlier ones" (R., p. 9).

Plaintiff also gave out interviews to reporters of various newspapers, subsequently published, which criticized the board of directors of the Company and were given for the purpose of obtaining proxies for use at the annual meeting (R., p. 202).

At that annual meeting the entire board of directors were reelected by the largest number of votes ever cast at any annual meeting in the history of the Company (R., p. 204). The numbers of votes that were cast for the successful candidates varied from 2,608,201 to 2,615,973, whereas the number of votes cast for the sole candidate advanced by plaintiff was 11,980 (R., p. 203). Plaintiff himself voted for all of the directors with the exception of defendant Hill (R., p. 203).

If these directors had been defeated for reelection, clearly a new board could not have retained them as executives in face of the stockholders' disapproval as evidenced by such defeat, and they would have been unable to complete the year's service as required by the agreement under which the stock was allotted (R., pp. 204, 115-116).

The candidate nominated by plaintiff to take the place of Hill was one who had had no experience in the tobacco business, having been engaged for a number of years in the steamship business, and of whom plaintiff stated at the meeting, after nominating him, that he *"did not know him, of him or about his qualifications"* (R., pp. 203, 238-239).

Plaintiff in his desire to prevent Hill from being reelected as a director of the Company was thus willing to imperil and prejudice the investment of some 40,000 stockholders by putting forward his unknown and untried candidate (R., p. 238).

The Rights of the 521 Employes, None of Whom Was a Director.

There are 521 employes to whom stock was allotted under the Plan who were not Directors. None of these employes was named as a defendant or served with process. The record shows that these 521 employes are employed in many different States in the Union, as well as in foreign countries (Exh. H, R., pp. 131-153).

The Company, under the authority conferred by the stockholders as above described, made a contract with each participant under which such participant was to receive stock allotted to him, provided payment therefore was made in cash and services were rendered throughout the year (Exh. G, R., pp. 91-130).

Each one of those employes has completed the services which were part consideration for the allotment of the stock; and each is entitled to be heard before his rights in this stock are stricken down.

Summary of Argument.

I. Plaintiff has failed to comply with Equity Rule 27.
(In Response to Plaintiff's XI.)

II. The action is an attempt to interfere with the internal management of a foreign corporation engaged in a nation-wide business, affecting rights of persons not parties to the action who reside in many jurisdictions other than New York. As such the courts of the corporate domicile afford the proper forum.
(In Response to Plaintiff's X.)

III. The directors were not disqualified from constituting a quorum or voting for the submission of the Plan to the stockholders pursuant to the provisions of the New Jersey statute.
(In Response to Plaintiff's I.)

IV. The notice to stockholders submitting the Plan for their approval omitted none of the essential facts.
(In Response to Plaintiff's II.)

V. The Plan conformed to the statute.
(In Response to Plaintiff's III.)

VI. The Plan was not an invasion of any stockholder's pre-emptive right.
(In Response to Plaintiff's IV.)

VII. There was no disposition of corporate assets contrary to the charter.
(In Response to Plaintiff's V.)

VIII. Chapter 175, Laws of 1920, State of New Jersey, as well as the General Corporation Law of New Jersey, authorized the allotment of stock to employes at its par value and the services to be rendered by the allottees.
(In Response to Plaintiff's VI.)

IX. The allotment of the stock, to be delivered only when the employe should have completed his services for the balance of the year and paid in cash the par value of the stock, was neither a violation of the directors' fiduciary obligation nor a waste of the Company's assets.
(In Response to Plaintiff's VII.)

X. The resolutions authorizing allotment of the stock were made under the express authority conferred upon the directors by the stockholders.
(In Response to Plaintiff's VIII.)

XI. The allotment of the stock in January 1931 "by way of additional compensation for services to be rendered" was authorized by the statute and by the Plan.
(In Response to Plaintiff's IX.)

XII. Conclusion.

THE SUIT REPRESENTS AN ATTEMPT BY PLAINTIFF—WHO OWNS LESS THAN 1/100 OF ONE PER CENT. OF THE COMMON STOCK—TO OVERRIDE THE EXPRESS MANDATE OF HIS FELLOW STOCKHOLDERS.

The plaintiff is opposed to profit sharing plans of any kind and believes that they constitute a "pernicious" trend in corporate affairs (R., p. 9). His theory of corporate

management is that officers and employes should receive only a fixed salary. He, of course, had the right, when the matter was presented for stockholders' action to attempt to persuade his fellow stockholders to adopt his views. In such efforts he has failed completely, and no other stockholder has joined him in the present litigation although his bill extends to all an invitation so to do. Standing alone, therefore, as he does, owning but 600 out of 4,688,000 shares of common stock outstanding, he should not be permitted to impose his policy upon the Company against the wishes of the other stockholders.

Plaintiff is determined to frustrate the settled policy of one of this country's most successful industrial enterprises for the upbuilding of its business and the stimulation of the efforts of its invaluable employes.

Such a success as has been achieved by this Company did not come about by the mere fortuitous workings of chance. It is the result of highly concentrated and thoroughly trained human service.

This Company has adopted as its cardinal business principles, the following:

1. Its directors and executives must be men capable of exercising broad vision and of understanding large affairs and difficult problems.

2. As a principle of business administration these men should be given their life stakes and the realization of all their ambitions within the compass of the Company's success.

According to the view of an overwhelming majority of the stockholders the prosperity of this enterprise depends upon the key men participating in the profits of the business, so that their success will be wrapped up in the Company's continued prosperity (R., p. 237). The Company's recognition of this principle has brought it to its present success and

preeminence, and the future of the Company depends upon its continued adherence thereto (R., p. 236).

The fruition of that policy is shown by the achievements accomplished thereunder.

ARGUMENT

I.

Plaintiff has failed to comply with Equity Rule 27.

The complaint does not allege that any demand was made by plaintiff upon the stockholders to take any action with respect to the Plan, or give the causes of plaintiff's failure to seek such action, or any reason for not making the effort. The complaint does not allege that defendants owned or controlled the majority of the outstanding stock of the Company. The complaint does not allege any combination of the majority of the stockholders. The complaint contains no allegation that an appeal to the stockholders would be futile or that any emergency existed that warranted plaintiff in not resorting to the stockholders.

The great number of cases involving stockholders' actions disclose that they can be brought for only a few purposes, that the grievance must be clearly shown to be real, calculated to cause irreparable injury, and that every means of redress within the corporation itself has been exhausted or clearly shown to be unnecessary and futile by reason of hostile control. When it is considered what injury may, in many instances, be done to a going and solvent corporation by having its management assailed by vexatious suits of this character at the instance of minority stockholders, it seems inevitably to follow that recourse should be had to the stockholders themselves before an action of this kind is brought.

Notices for the stockholders' meeting were sent out on June 25, 1930. The Plan was adopted by the stockholders

on July 28, 1930. The allotments were made and announced on January 28, 1931.

Plaintiff's action was not commenced until the latter part of February, 1931. He had all the intervening time to make a demand upon the stockholders, to institute action, or to take steps with respect to the repeal of the Plan in accordance with the remedies available to him.

Plaintiff could have applied to the Courts of New Jersey for an injunction before the Plan was passed upon by the stockholders. *Scott* v. *P. Lorillard Co.,* 108 N. J. Eq. 153, affd. 109 N. J. Eq. 417; *Berendt* v. *Bethlehem Steel Corporation,* 108 N. J. Eq. 148.

Passing this, the State of New Jersey has, in effect, what is a referendum and recall with respect to corporate management. New Jersey is unique in this respect as it is the only State to our knowledge that has such a statutory provision.

This statute is Section 46, Chapter 185 of the Laws of 1896 of the State of New Jersey. The germane provisions of that Act provide:

> "* * * three or more stockholders having voting powers may call [a] meeting by publishing ten days' notice of the time, place and purposes of the meeting in a newspaper published in the county in which its principal office in this state is located, and mailing such notice to all stockholders whose post office address is known or can be ascertained; a meeting called as aforesaid shall be a *legal meeting* of the corporation, * * *."

Thus, plaintiff under that statute could have joined with any two stockholders to call a meeting for the purpose of taking action with reference to the Plan.

By Section 3 of the Act under which the Plan was authorized, it is provided that:

> "Any plan adopted * * * may be recalled, abolished, revised, amended, altered or changed in

the same manner as is herein provided for its adoption; * * *."

Under the provisions of that statute, plaintiff could have gone to the stockholders and asked them to take action to rescind the Plan. He argues that the Plan could be changed or abolished only by first having a directors' meeting declaring that it was inadvisable. The fallacy of that contention is that it gives no consideration to the provisions of L. 1896, Chap. 185, § 46, *supra*.

Those two sections read together demonstrate that any meeting called by three stockholders would be a "legal meeting," no matter how many stockholders attended, which could, in the matter of action upon the Plan, take the necessary steps to obtain its rescission or modification.

Plaintiff cites no New Jersey case in support of his adverse construction of the statute, and there is none.

The statute authorizing the Plan gave a dissenting stockholder the right of appraisal (L. 1920, Chap. 175, § 2). That section of the statute provided that a stockholder who did not vote in favor of the Plan could within thirty days after the Plan was adopted file with the Secretary of the Company a dissent in writing therefrom, and could apply, within ten days after the filing of such dissent and upon five days' notice to the corporation, to the Circuit Court of the county in which the Company had its principal office, for the appointment of three disinterested appraisers to appraise the fair value of his stock. This right was afforded to any stockholder whose stock was issued prior to the enactment of the statute in 1920 and was therefore applicable to plaintiff, who had been a stockholder since 1916 (R., p. 12).

The New Jersey Legislature thus indicated a legislative intent that the mandate of two-thirds of the stockholders approving the Plan under the Act was to be final and conclusive upon the corporation and all of its stockholders, notwithstanding the fact that some stockholders might dissent;

but that, in order to avoid any possible claim of unfairness to such dissenting stockholders, they were to be afforded the opportunity to sell their stock to the corporation immediately at a fair price.

Plaintiff overlooks the controlling decisions of this court, *United Copper Co.* v. *Amalgamated Copper Co.*, 244 U. S. 261; *Wathen* v. *Jackson Oil Co.*, 235 U. S. 635. His contention is that Rule 27 should not be held applicable in the instant situation because the Company is large and its stock is widely distributed. There is no such exemption stated in Rule 27 and there has been no such distinction made in any of the cases interpreting that rule. To give sanction thereto would be to abrogate the rule as to all large corporations whose stock is held by the public.

In *United Copper Co.* v. *Amalgamated Copper Co., supra,* Mr. Justice BRANDEIS said (pp. 263-4):

> "Courts interfere seldom to control such discretion *intra vires* the corporation, except where the directors are guilty of misconduct equivalent to a breach of trust, or where they stand in a dual relation which prevents an unprejudiced exercise of judgment; *and, as a rule, only after application to the stockholders, unless it appears that there was no opportunity for such application,* that such application would be futile (as where the wrongdoers control the corporation), or that the delay involved would defeat recovery."

None of these exceptions applies to the instant case.

In *Stone, et al.* v. *Holly Hill Fruit Products, Inc.*, 56 Fed. (2d) 553, SIBLEY, C. J., in sustaining a dismissal of the complaint, because of a failure to comply with Rule 27, stated:

> "* * * If it had been distinctly alleged that all four of the directors who are joined as defendants were so involved as to make application to them obviously futile, there should have been an effort made through the stockholders to control or supplant them.

It is not alleged that there is any wrong combination of a majority of the stockholders, but only that they live at a distance, are ignorant of the situation, and send their proxies to the president. The plain remedy for that would be to seek another stockholders' meeting, after informing the other stockholders of the situation and asking them to withdraw their proxies and to attend. A stockholder, in taking stock in the ordinary corporation, submits, within the charter limits, to a guidance of the corporate affairs according to the will of the owners of a majority of the stock and through the directors whom the majority choose. The minority have a right to have the majority exercise their judgment, and to exercise it honestly and not fraudulently, but have no right to have a court substitute their own ideas and wishes for those of the majority, and that in advance of any refusal of the majority to hear and decide on the matter at issue. Minority stockholders may not in the absence of sudden emergency ask a court of equity to interfere in the management of their corporation until they have earnestly and unsuccessfully sought redress from the Board of Directors, and where appropriate also from the stockholders in meeting, unless they can show sufficient reasons for not doing so. This is implied in the provisions of Equity Rule 27 (28 USCA Sec. 723)."

Continental Securities Company v. *Belmont,* 206 N. Y. 7, cited by plaintiff, was a case arising under the New York law respecting a New York corporation and, as there pointed out, stockholders of corporations of that state cannot act in relation to the ordinary business of a corporation; the only power lodged with them is to change the personnel of the board of directors.

Even there the court said (p. 19), "* * * If the subject-matter of the stockholder's complaint is for any reason within the immediate control, direction or power of confirmation of the body of stockholders, it should be brought

to the attention of such stockholders for action, before an action is commenced by a stockholder unless it clearly appears by the complaint that such application is useless."

In New Jersey shareholders have much broader powers with respect to the affairs of a corporation than in New York. This being a New Jersey corporation, the statutes governing New Jersey corporations and the decisions of the New Jersey courts should be given their full weight by the Federal courts.

II.

The action is an attempt to interfere with the internal management of a foreign corporation engaged in a nation-wide business, affecting rights of persons not parties to the action who reside in many jurisdictions other than New York. As such the courts of the corporate domicile afford the proper forum.

It was on this ground that the learned judge of the District Court, applying the doctrine of *forum non conveniens*, dismissed the plaintiff's bills of complaint without prejudice to further proceedings in the courts of New Jersey.

The general right of a court, even where jurisdiction technically exists, to decline its exercise in favor of a more appropriate forum is well settled. *Canada Malting Co., Ltd.* v. *Paterson Steamships, Ltd.*, 285 U. S. 413; *Cuba Railroad Co.* v. *Crosby*, 222 U. S. 473; *Langnes* v. *Green*, 282 U. S. 531; *Heine* v. *New York Life Insurance Co.*, 50 Fed. (2d) 382.

The record discloses that a great many of the allottees are employed in places other than the State of New York (Exh. H, R., pp. 149-150). Indeed plaintiff alleges in his complaint "In addition to such individual defendants, there are and were from 1929 to February 1, 1931, seven other directors of the said company, none of whom are residents of this State [New York] * * *" (R., p. 11). As the Com-

pany's activities are world-wide, so the beneficiaries of the Plan are scattered throughout the world. Plaintiff has not even attempted to name as defendants the other 521 employes who are not directors.

The action is an attempt to obtain a cancellation of stock issued by a New Jersey corporation. The jurisdiction, and only jurisdiction, in which the rights of the 528 employes who were not named as parties can be protected would be New Jersey, the state of domicile of the corporation.

A decree rendered by a New Jersey court in an action for cancellation would be binding upon all who might assert any rights in the stock sought to be cancelled therein, as such decree would be rendered in a proceeding *in rem,* where proper service could be obtained by publication. (New Jersey Practice Act of 1903, Sec. 84; *Pennoyer* v. *Neff,* 95 U. S. 714; *Jellenik* v. *Huron Copper Mining Co.,* 177 U. S. 1; *Andrews* v. *Guayaquil & Quito Ry. Co.,* 69 N. J. Eq. 211; *Pilger* v. *U. S. Steel Corp.,* 102 N. J. Eq. 506; *Holmes* v. *Camp,* 219 N. Y. 359; *Matter of Ulmann* v. *Thomas,* 255 N. Y. 506).

In the *Andrews* case, the court said (p. 214):

> "If the company is a New Jersey company, then the situs of its stock is in New Jersey, and any question relating to it may be determined here. Such is the decision of the supreme court of the United States in the recent case of *Jellenik* v. *Huron Copper Mining Co.,* 177 U. S. 1. The provisions of our statutes (Execution Act, Gen. Stat. 1415 § 4; Corporation Act of 1896 p. 280 §§ 7, 8, 20) are substantially similar to the Michigan statutes that were under consideration in that case."

The Company is not one that, as a matter of convenience, was organized in New Jersey and which keeps all, or substantially all, of its assets and does all of its business in another single state. Its activities are world-wide. Its prin-

cipal office is located in New Jersey and all of its stockholders' meetings are there held (R., p. 69). It has factories and a number of branches in that state and maintains bank accounts there (R., p. 229).

Not only have many of the statutes involved never been construed, but their interrelation never has been passed upon by the courts of New Jersey. The construction of those statutes is a vital factor in the determination of the present cause. This is apparent from the complaint as well as from plaintiff's brief, where he asserts at different places the construction and effect of his interpretation of the different statutes.*

The rule is clear that a court other than one of the corporate domicile will decline to assert jurisdiction of an action involving the internal affairs of a corporation, especially when the decision must turn upon the statutes and decisions of the domiciliary state. (*Cohn* v. *Mishkoff Costello Co.*, 256 N. Y. 102; *Matter of People* (*Russian Reinsurance Co.*), 255 N. Y. 415; *Powell* v. *United Assn. of Plumbers and Steamfitters*, 240 N. Y. 616; *Sauerbrunn* v. *Hartford Life Insurance Co.*, 220 N. Y. 363; *Cuppy* v. *Ward*, 187 App. Div. 625; affd. 227 N. Y. 603; *Wallace* v. *Motor Products Corp.*, 25 Fed. (2d) 655, cert. denied, 279 U. S. 859.)

The courts of New Jersey manifest the same reluctance to interfere with the affairs of a foreign corporation. (*Jackson* v. *Hooper*, 76 N. J. Eq. 592; *Eckrode* v. *Endurance*

* The construction of the following New Jersey statutes is involved in this cause: General Corporation Act, § 1 L. 1896, Ch. 185, § 1) (Powers of Corporation); General Corporation Act, § 46 (L. 1896, Ch. 185, § 46) (Three Stockholders can call meeting); General Corporation Act, § 47 (L. 1896, Ch. 185, § 47, as amd. L. 1901, Ch. 110, § 2 as amd. L. 1926, Ch. 318, § 14) (Power of Directors respecting capital and dividends); General Corporation Act, § 121 (L. 1920, Ch. 168, § 1, as amd. L. 1921, Ch. 284, § 1, amd. L. 1926, Ch. 318, § 15, supplementing L. 1896, Ch. 185, amd. L. 1930, Ch. 120) (Issuance and sale of shares); General Corporation Act, § 124 (L. 1926 Ch. 318, § 16) (Rights of stockholders respecting new stock issued for cash); General Corporation Act, § 151 (L. 1917, Ch. 195, § 1) (Issuance of stock for labor); General Corporation Act, §§ 158-158c (L. 1920, Ch. 175, §§ 1-4) (Statute authorizing the Plan).

Tire & Rubber Co. of New York, 90 N. J. Eq. 129, affd. 91 N. J. Eq. 153.)

Those cases are particularly apt because they both involve refusal of the courts of New Jersey to take jurisdiction of matters concerning the internal affairs of a New York corporation.

The plaintiff relies upon *Williamson* v. *Missouri-Kansas Pipe Line Co.,* 56 Fed. (2d) 503. That case did not purport to overthrow the rule that a court of foreign jurisdiction will not interfere with the internal affairs of a corporation where those affairs relate to matters which involve construction of the laws of the state of corporate domicile.

The quotation by plaintiff, on page 32 of his brief, shows the fundamental difference between the situations presented.

The Delaware corporations there under attack had no assets in Delaware, transacted no business there, maintained only statutory offices, and had no officers or directors resident there. Furthermore, all the transactions complained of were consummated in Illinois, and a substantial part of the properties and assets were located in Illinois under the direct supervision of the Illinois District Court. The *Williamson* case represents a perfect example of the situation distinguished by PATTERSON, *D. J.,* in his opinion in the District Court: "If the enterprise is really a local one, with practically all its activities confined to the state where suit is brought, a domicile elsewhere, purely technical, may not receive tender treatment" (R., p. 277).

A judgment of the District Court for the Southern District of New York directing cancellation of the stock in controversy could not be effective in the courts of New Jersey as against a suit brought in that state by an employe not a party to this cause.

In the *First National Bank of Lyndhurst* v. *Bianchi & Smith,* 106 N. J. Eq. 333, the court pointed out that (p. 335): "But this court is not bound by that decision. In construing

state statutes it is the province of our courts to lead, not to follow, those of federal or other foreign jurisdictions."

That decision is in conformity with the case of *Kimball* v. *St. Louis & San Francisco Railroad Co.*, 157 Mass. 7, where stockholders of a Missouri corporation brought suit in Massachusetts to enjoin an issue of bonds which the corporation proposed to sell. The court dismissed the bill, Mr. Justice HOLMES saying (p. 8):

> "But it seems to us clear that, as among the states of this Union, the plaintiffs ought to resort in the first instance to that court which alone can declare the law of the case with authority, and can compel obedience to it by force. It would be a misuse of our powers to attempt to control the action of those courts, in a case like this, by an adjudication which would depend upon them for enforcement, and which they might say had mistaken the Missouri law."

III.

The directors were not disqualified from constituting a quorum or voting for the submission of the Plan to the stockholders pursuant to the provisions of the New Jersey statute.

The New Jersey Act of 1920 (Appendix A) provides "that the privileges and powers" granted by the statute may be "exercised in the manner following: * * * the board of directors shall first formulate such plan or plans and pass a resolution declaring that in its opinion the adoption thereof is advisable, and shall call a meeting of the stockholders to take action thereon. * * * If two-thirds in interest of each class of stockholders present at said meeting and voting shall vote in favor of any such plan or any modification thereof, the said plan shall thereupon become operative."

The plaintiff contends that since, under the provisions of the Plan, directors who were also employes were eligible to

share in its benefits, all of such directors (constituting, with one exception, the entire membership of the board) were disqualified from voting for the preliminary resolution required by the statute as a prerequisite to the submission of the Plan to the stockholders.

It is clear, however, that no director was dealing with himself in voting for such a preliminary resolution, the effect of which was merely to bring up the matter for consideration by the stockholders. The Plan was the act of the stockholders, not of the directors. No director could know in advance whether the holders of two-thirds of the stock of the Company would approve the Plan. The stock of the Company was widely distributed and the directors did not own or control even a majority of the stock, while the statute required the approval of the holders of two-thirds of the stock of the Company (R., p. 200). Moreover, no director could know on June 25, 1930, the date of the directors' meeting, whether, in the event the stockholders should approve the Plan, he would be an employe at the time of any allotment made under it.*

If plaintiff's contention were sound, it would automatically preclude any New Jersey corporation, all or a majority of whose directors were employes, as is the case with this Company, from putting into effect a plan under the Act by the terms of which director-employes might be permitted to participate, although the New Jersey Legislature obviously intended that the benefits of the statute should be open to all New Jersey corporations.

The plaintiff's contention is also irreconcilable with the well-established rule in New Jersey that, in the case of transactions in which there is an original infirmity because of the participation of interested directors, such defect is entirely cured by ratification by the stockholders (*Hodge* v. *United*

* Since the Plan has gone into effect, the following defendants have died or resigned: Penn, Mower, Fletcher and Keene.

States Steel Corp., 64 N. J. Eq. 807; *Pierce* v. *Old Dominion Co.*, 67 N. J. Eq. 399; *Purchase* v. *Atlantic Safe Deposit & Trust Co.*, 81 N. J. Eq. 344, affd. 83 N. J. Eq. 353; *Lillard* v. *Oil, Paint and Drug Co.*, 70 N. J. Eq. 197).

This is also the rule of this Court (*Leavenworth* v. *Chicago Railway Co.*, 134 U. S. 688).

In the *Hodge* case, *supra*, the Court of Errors and Appeals had before it the following state of facts:

The Steel Corporation's board of directors, comprising twenty-four members, had resolved "that it would be *advisable* to decrease the capital stock of the corporation to the extent of two million shares, and to retire them by means of an issue of bonds," and "called a meeting of the stockholders * * * for the purpose of voting upon the proposed plan for the purchase and retirement of that amount of preferred stock * * *."

Prior to the notice of that meeting, the directors had entered into an underwriting contract with a syndicate of which more than fifteen members of the Board of Directors were parties. The notice advised the stockholders of the directors' interest *but not of its extent.* The effect of the agreement was to enable the syndicate to make a commission of $8,000,000.

The highest court of New Jersey, in upholding the transaction, said, after referring to the rule that directors cannot lawfully enter into a contract with the company without the knowledge and consent of the stockholders (p. 814):

> "The rule is imbedded in our jurisprudence, and it cannot be too strongly stated or too rigorously applied. But in the cases cited the contract was made by the trustee without the knowledge or consent of the *cestui que trust* and without subsequent ratification or adoption by which the vice in it could be cured.
>
> * * * * * * * * *

"It is a settled rule of corporation law that the personal interest of directors renders a transaction voidable at the option of the stockholders, and not void *per se.*

* * * * * * * * *

"*A fortiori,* when the contract is entered into by the stockholders with the directors, or when the stockholders expressly authorize the directors to enter into a contract, when the stockholders have notice of the directors' interest, the agreement will be unassailable in the absence of actual fraud or want of power in the corporation."

The two cases cited by plaintiff (*Kavanaugh* v. *Kavanaugh Knitting Co.,* 226 N. Y. 185, and *Barrett* v. *Bloomfield Savings Institute,* 64 N. J. Eq. 425) have no application to the case at bar.

In the *Bloomfield* case, the question arose under a New Jersey statute empowering the managers of a savings institution to dissolve. Such a bank had no stockholders, so that the power to dissolve rested solely with the managers. It appeared that the managers were exercising such power in order to sell the assets of the savings bank to a trust company which they owned, and no legitimate ground for dissolution of the savings bank was shown. The Court held that the public as well as the depositors had an interest in the maintenance of such a banking institution, and that, under the circumstances, the Court should exercise a power of review with respect to the action of the managers.

In the *Kavanaugh* case, the question presented was whether the complaint stated a cause of action. It appeared that the defendants, directors who were also majority stockholders, were dissolving a prosperous corporation against the protest of the plaintiff, a minority stockholder, who had theretofore brought an action seeking to compel the defendants to account for their malfeasance in office. The dissolution was a step in a scheme of directors who were the majority stockholders to turn over the assets to a new corporation

to be owned solely by themselves. It was not a transaction in which the action of the directors was to be submitted to independent majority stockholders for approval.

The other cases cited by plaintiff in this connection are equally inapplicable for like reasons.

IV.

The notice to stockholders submitting the Plan for their approval omitted none of the essential facts.

Plaintiff's theory seems to be that the Plan was void in its inception because the letter to stockholders accompanying the notice of the special meeting of July 28, 1930 did not refer to other stock plans which had been in effect in the past or to the fact that the chief executives were receiving compensation under Article XII of the by-laws, adopted by the stockholders of the Company in 1912.

These stock plans related to past periods, for the most part many years prior to 1930. The services which they were designed to compensate had long since been performed, to a large extent by others than those who were the allottees under the Plan (R., pp. 167, 131-153). There is no allegation in the complaint that the amounts paid under such prior plans were excessive for the services rendered.

These prior stock plans and the payments of compensation made in connection with them do not rest upon the Act of 1920 but upon the authority which has always been inherent in the board of directors of every New Jersey corporation to pay compensation to employes including such as were directors. See *infra,* pages 36, 37.

Plaintiff has made the prior stock plans the subject of a separate litigation which has not yet been reached for trial, and any question as to the validity of such prior stock plans will be disposed of on the issues joined in that suit. These prior plans must stand or fall by themselves. It is obvious

that the merits of that litigation are not germane to the instant suit and can neither be heard nor determined here.

These former plans had no relevancy to the new Plan, which related to services to be performed in the future, and there was no reason whatever why they should have been mentioned in the circular letter.

Nor was there any reason whatever why mention should have been made of the provision which this Company, like most other large corporations, was making for medical services and pensions "to deserving employes" who had been retired either by physical disability or old age.

The profit-sharing participation of the President and certain Vice-Presidents pursuant to Article XII of the by-laws could not have been a matter of secrecy as it had been actually adopted by vote of the stockholders themselves; it was known as inherent in the Company's business policy ever since publicly adopted in 1912. Plaintiff has brought a suit attacking the by-law, which has been decided adversely to him. *Rogers* v. *Hill et al.*, 60 Fed. (2d) 109. While the plaintiff claims that the by-law provision was unknown to him, he does not allege that it was unknown to the other stockholders, and both he and all other stockholders had, at least, constructive notice of all the provisions of the by-laws. (*Giesen* v. *London and Northwest American Mortgage Co.*, 102 Fed. 584; *Richardson* v. *Devine*, 193 Mass. 336; *Kavanaugh* v. *Commonwealth Trust Co.*, 223 N. Y. 103, 107; *Baumohl* v. *Goldstein*, 95 N. J. Eq. 597.)

As a further indication that these several matters were immaterial, it appears that the plaintiff himself had no difficulty, from the information furnished by the notice of the special stockholders' meeting and the circular letter and copy of the Plan accompanying the notice, in formulating his opposition to the Plan, his statement of which at the time of the special meeting was based on substantially the same grounds as those which he has ever since

maintained in opposition to it (R., p. 15). On the other hand, the other stockholders of the Company, notwithstanding the detailed information which they, as well as plaintiff, have received from time to time regarding all of these matters, both directly from the Company (Exh. G, R., pp. 91-130) and from the widespread publicity which the case has received during the pendency of this suit, have not only refrained from joining or supporting the plaintiff in his litigation, but have continued to reelect the same directors and management by overwhelming vote.

Plaintiff refers to a letter (in response to a communication from plaintiff revoking his proxy) sent by one of the defendants to plaintiff's associate, some six months prior to the date on which the Board allotted the stock, and, of course, at a time when no price had been fixed. The letter contain nothing that could possibly be regarded as a misstatement. Plaintiff did not thereafter send his proxy, but, on the contrary, in attacking the Plan at the special stockholders' meeting, stressed the fact that the directors could issue the stock at par (R., p. 15).

The length to which plaintiff goes in his search for grounds of complaint is perhaps best indicated by his criticism of the language of the circular sent to the stockholders with the notice of the meeting. At that meeting the par value of the common stock was to be reduced from $50 a share to $25 a share, and the number of common shares was to be doubled, and the letter stated that if the program outlined in the letter was approved, it was expected that an extra dividend of $4 a share on all of the old stock would be paid and regular quarterly dividends on the newly authorized shares would be initiated at the annual rate of $5 a share. The success of the Company under the defendants' management made possible such payments, but this precise distribution of dividends could, of course, not be made unless the changes in the stock structure were authorized as pro-

posed at the meeting, and this is obviously all that the letter intended to say. Plaintiff, however, has no difficulty in attributing to the passage a sinister meaning and argues that these dividends on the old and new stock were predicated on an approval of the Plan by the stockholders and constituted a "bribe" to the stockholders. Plaintiff, who received the extra dividend of four dollars per share (R., p. 250) does not allege that he ever objected to or declined to accept this so-called "bribe." He does not claim that his acceptance of this extra dividend barred him from any of his rights. Except as such a claim is symptomatic of the plaintiff's attitude towards the entire case and towards the management of the Company, the contention requires no comment.

V.

The Plan conformed to the statute.

In reliance upon the interpretation placed by the dissenting judge upon the New Jersey statute (L. 1920, Ch. 175), plaintiff urges, for the first time, that the Plan failed to conform to that Act because it entrusted too great a measure of discretion to the directors.

An examination of the Plan submitted to the stockholders demonstrates persuasively that it was in strict conformity with the Act. The Plan showed upon its face that:

(1) the employes were to be permitted to purchase stock by way of additional compensation for services to be rendered.

(2) the number of shares available to be allotted to employes was approximately 312,000.

(3) the Board of Directors were to determine

(a) when that stock should be offered;
(b) to whom to be issued; and
(c) upon what terms to be issued.

(4) the price was to be not less than the par value of the shares allotted.

(5) no stock was to be delivered until fully paid for.

(6) the directors were eligible provided they were employes.

The Plan did not state the number of shares and to whom those shares were to be given because to have done so would have made the Plan inflexible. The stockholders knew that the directors were to determine when the shares were to be issued, who the allottees were to be and the amount that each allottee should receive. It would have been impossible to have conferred that function upon the stockholders because they did not have the detailed knowledge that comes from the daily contact with the personnel and the daily changes in the business that the management possesses. If all the employes—that is the rank and file— were to participate, the Plan would have so provided. But it did not, the stockholders knew that it did not and the stockholders did not desire it. The essence of the Plan was to spur on the key men who most directly contribute to successful operation. The Plan was scientifically conceived, and was well designed to advance the interests of the Company. It contemplated the setting aside a sufficient amount of stock to create a reserve of stock which might be allotted by the management from time to time over a period of years. All of the stock was not to be distributed at once, otherwise the Plan would have so provided. On the other hand, the management was not required to appeal to the stockholders for authority on each occasion when it became advisable to make an allotment of stock to employes. The Plan adopted was flexible, adaptable to changing conditions and capable of producing the maximum benefit to the Company.

The administration of the Plan by the directors was a faithful, accurate execution of the stockholders' mandate.

Thus the formula that was adopted in allotting the stock to participants was carefully worked out with a view to furthering the object of the Plan. It was based upon:

1. The compensation paid to each participating employe, as a general measuring rod.

No fairer basic measure of an employe's worth to a corporation can be used.

2. The maximum allotment of stock to any one participant limited to an amount of stock having a par value equal to one-third of his compensation for 1930.

This was a reasonable limitation for the particular occasion.

3. The variation due to different degrees of actual and potential promise and ability between employes receiving the same compensation.

This afforded opportunity for superior executives to allow for a separate individual rating for each participant, rather than to handle them as a class. This was in every case determined for each participant by his immediate superiors and with such recommendation passed on for the ultimate judgment of the executive officers.

4. The measuring of such variation by rating each participant on a percentage basis as compared to a key man in the same department.

This was finally expressed by a percentage, thereby giving each participant the benefit of being considered for himself alone and of the recognization of his individual merit as well as his potentialities.

5. The application of such percentage to the maximum of one-third of the salary earned by the participant in 1930.

This was merely applying the participant's individual rating to his annual compensation in order to arrive at the number of shares to be allotted to him.

Thus, a man whose salary was $10,000 and who was rated at 60%, would be allowed to subscribe to shares having a par value of 60% of one-third of his yearly compensation, i. e., 60% of $3,333, which is $2,000 of stock at the par value of $25 per share, or 80 shares.

It is submitted that the Directors faithfully executed the mandate of the stockholders in adopting the foregoing formula.

Corporations of New Jersey have always had power to appoint such officers and agents as the business of the corporation may require, to allow them suitable compensation, and to make by-laws providing for the management of its property and the regulation and government of its affairs (L. 1896, Ch. 185, § 1). The New Jersey Corporation Act expressly provides that the business of every corporation shall be managed by its directors (L. 1896, Ch. 185, § 12; as amended by L. 1926, Ch. 318, § 4).

The by-laws of the Company provide that the salaries of all officers elected by the board of directors shall be fixed by the directors (Art. V, Sec. 1; R., p. 73), and that the salaries of all other agents and employes shall be fixed by the President subject to the control of the directors (Art. V, Sec. 2; R., p. 73).

Long prior to and at the time of the passage of the Act of 1920 under authority of which the Plan was submitted to the stockholders, it was the law of New Jersey that stock might be issued as compensation for any services rendered the corporation. The purpose of the Act was to give legislative approval, and, in the public interest, to encourage the policy adopted by many corporations of issuing stock to employes in order to secure the advantage of continuous service and increasing loyalty. The Act did not pur-

port to restrict the authority previously possessed by such corporations, or to limit the positive provisions of the statute, charter or by-laws vesting in the directors the general management of the affairs of the corporation. It expressly provided that the *privileges and powers thereby conferred were in addition to and independent of any and all powers and authority* conferred by any other law or laws and not in restriction or limitation of any powers otherwise belonging to corporations of New Jersey (L. 1920, Ch. 175, § 4).

Long before and at the time of the passage of the Act of 1920, it was also the law in New Jersey that *a contract made between directors and their corporation, authorized by the stockholders after notice of the directors' interest, was unassailable* save for actual fraud or want of power in the corporation. *United States Steel Corporation* v. *Hodge,* 64 N. J. Eq. 807, 813-814. The Act of 1920 specified how this assent of stockholders might be procured.

The Act does not prescribe details or mechanics of any plan to be submitted to stockholders. These details can be determined only by the directors. As the right to issue stock for services is established by law, the essence of such plans is merely compensation to employes. Always in New Jersey the power to fix compensation has been vested in the directors. *Beck* v. *The Pennsylvania R. R. Co.,* 63 N. J. L. 232.

The Plan is in strict accord not only with the State laws, the charter and by-laws of the corporation, but also with the general practice of other New Jersey corporations. In view of the constant changes in business conditions it would be unreasonable to attribute to the Legislature a design to have specified, either in a Certificate of Incorporation or in a plan to be submitted to the stockholders, the details of selection of employes to whom, over a period of years, such compensation should be awarded, or the amount of, or the terms upon which, the stock could be acquired. To make such a plan workable these features must necessarily be left for determination by the board of directors.

Plaintiff cites no New Jersey case in support of his contention. The fact is that there is none.

VI.

The Plan was not an invasion of any stockholder's preemptive right.

The preemptive right of a stockholder of a New Jersey corporation has never been held to be a contract right. In its inception it was but the result of a rule of equity adopted by the courts to defeat the acquisition by one or more stockholders of additional shares of stock of a new issue at a price more favorable than that afforded other stockholders. The rationale of the rule is to preserve the proportionate interest of the stockholders in the voting rights and property of the corporation.

Consequently, the rule has always been confined to an issue of stock solely for cash, and never has been applied to stock issued for either property or services, or for any other purpose resulting in a common benefit to all stockholders.

In all cases in New Jersey wherein the right of preemption has been sustained, there was an intention to obtain control of the corporation for the benefit of a few, at the expense of a great majority of the stockholders. (*Meredith* v. *Zinc & Iron Co.*, 55 N. J. Eq. 211, affd. 56 N. J. Eq. 454; *Way* v. *American Grease Co.*, 60 N. J. Eq. 263; *Grausman* v. *Porto Rican-American Tobacco Co.*, 95 N. J. Eq. 155, affd. 95 N. J. Eq. 223.)

In *Scott* v. *P. Lorillard Co.*, 108 N. J. Eq. 153, affd. 109 N. J. Eq. 417—relied upon by plaintiff—the issue of stock was not made under authority of the Act of 1920. Indeed, in that case defendant disclaimed proceeding under the Act of 1920. The proposed issue of stock in that case had no relation to services, but was predicated entirely upon the ownership of other shares; that is, stock was to be issued to officers and employes based upon their stockholdings.

No provision, express or implied, of the Company's charter, confers upon a stockholder any right of preemption in newly issued stock. And prior to 1926, there was no statute of New Jersey conferring any such right upon a stockholder.

The statutory right was first declared by Section 16, Chapter 318, L. 1926, which provides:

> "Upon the issue of capital stock for *cash,* unless otherwise expressly provided in the certificate of incorporation, or in by-laws adopted by two-thirds in interest of each class of stockholders, every stockholder shall have a right (unless waived by him) according to the number of shares held by him to purchase his pro rata proportion of the stock to be issued, at such price (which may be in excess of the par value), within such time and on such terms as shall be fixed and determined by the board of directors; * * *."

Subsequently, in *Bingham* v. *Savings Investment and Trust Co.* (Ct. of E. & A. 1928), 102 N. J. Eq. 302, speaking of the preemptive right of a stockholder in a New Jersey corporation, the Court said (p. 306): "The right of stockholders to participate in an increase in capital stock of the corporation is purely statutory, and subject to modification or repeal by the legislature."

The Act of 1926 is limited solely to stock issued for cash. It excludes, by failing to include, any issue for services or property. Indeed, the law of New Jersey always authorized the issuance of stock in payment for services. *Vineland Grape Juice Co.* v. *Chandler,* 80 N. J. Eq. 437, 440; L. 1917, Ch. 195.

The Act of 1920 expressly authorizes issuance of stock to employes as additional compensation for their services, and contemplates such an issue even before the services have been performed. Its purpose was to give legislative approval to a policy previously adopted by many corporations in the interest of all stockholders.

In the instant case, while the consideration paid when the title passed to the Trustees was cash, the Plan and the subscription agreement (Exh. G) provided that the services were to be additional consideration. The agreement stipulated in accordance with the provisions of the Plan that the allottee could not have delivery unless he completed the services for the year 1931. Except for the payment of par value, it was an issue of stock for services. Under the terms of the trust agreement if a subscription was cancelled for any reason, the stock went back to the Company.

While the relationship between the Acts of 1920 and 1926 has never been passed upon by any court in New Jersey, it is obvious that the Act of 1926 did not purport to repeal any of the provisions of the Act of 1920 and that those two statutes are not inconsistent with each other.

There was no change in voting rights, as the stock here involved is non-voting stock. Its distribution to employes for services to be rendered will redound to the common interest of all Company stockholders. The stockholders have themselves so decided.

The issue of stock under the Plan does not prejudice any preemptive right of a stockholder. It involves no constitutional question or invasion of plaintiff's contract rights.

VII.

There was no disposition of corporate assets contrary to the charter.

The allotment of this stock was in payment for services, not out of profits, but merely as a part of the expenses of the business.

The section of the charter quoted by plaintiff has application only to such profits as exist after the expenses of conducting the business have been fully paid. (*Bennett* v. *Millville Improvement Co.*, 67 N. J. L. 320; *Booth* v. *Beattie*, 95

N. J. Eq. 776, affd. 95 N. J. Eq. 776; *Berendt* v. *Bethlehem Steel Corp.*, 108 N. J. Eq. 148; *Harker* v. *Ralston Purina Co.*, 45 Fed. (2d) 929, cert. denied 284 U. S. 619; *Church* v. *Harnit*, 35 Fed. (2d) 499, cert. denied 281 U. S. 732; *Young* v. *U. S. Mortgage & Trust Co.*, 214 N. Y. 279; *Putnam* v. *Juvenile Shoe Corp.*, 307 Mo. 74; *Zwolanek* v. *Baker Mfg. Co.*, 150 Wis. 517.)

Profit participation creates an item of expense in the operation of the business, and the right of a corporation to permit a profit participation as means of compensation is now so well recognized as not to be the subject of debate. *Bennett* v. *Millville Improvement Co.*, 67 N. J. L. 329, and cases cited in preceding paragraph.

Plaintiff's contention, if sustained, would destroy all employes' stock plans, because it is their inherent characteristic to allot the stock to employes at a price under the market value. Plaintiff attaches great importance to the fact that in January, 1931, when the allotment of stock was made under the Plan, the market price of the stock was $112 a share, which was $87 more than the par value of $25 a share, and made a total difference of about $5,000,000 between the market value and the par value of 56,712 shares. As will be shown under Point IX, the market value at the time of the allotment is immaterial because no stock could pass to the employes until after December, 1931, by which time there had been a tremendous drop in its market value. The only real significance that the question of market value could have in the situation is entirely disregarded by the plaintiff, namely, that in any employes' stock plan, the price of the stock to the employes must be sufficiently low so that there will be a benefit conferred upon the employes and therefor an incentive to stimulate their efforts. Accordingly, the price must be fixed at a point which, so far as can be anticipated, will be below the market price when the employe becomes entitled to the stock. The ultimate value of these shares will depend largely on the services rendered by the allottees.

In *Harker* v. *Ralston Purina Co.*, 45 Fed. (2d) 929, cert. denied 284 U. S. 619, the Court said (p. 930):

> "Every corporation has the right incidental to its expressed powers and purposes to exercise such incidental power as is necessarily implied in the legitimate achievement of its expressed powers. Among such is the employment of efficient employees. At the time appellee made the contract before us, it contracted for appellant's services for five years, and obligated itself, in consideration therefor, to sell to him some of its capital stock at a price less than its market value. By selling the stock to the employee, appellee made sure that the employee would have a personal interest in the welfare of the corporation. The natural tendency of such interest was to increase the zeal of the employee and thus to forward the chances of success in the corporation's legitimate operations. Furthermore, it enabled the faithful employee, if he continued his employment to the maturity of his contract, to partake of the profits of the corporation. In a word, the contract contemplated the insurance of faithful efficient service to the corporation and a corresponding reward to the employee. Such a contract was clearly praiseworthy in its motives from the viewpoint of both parties, and the option to repurchase was clearly included to encourage the stay of the employee to the end of the period of his employment."

VIII.

Chapter 175, Laws of 1920, State of New Jersey, as well as the General Corporation Law of New Jersey, authorized the allotment of stock to employes at its par value and the services to be rendered by the allottees.

Plaintiff's apparent although somewhat ambiguous contention that the issuance of stock under the Plan for services to be rendered was unlawful for the reason that the stock of a New Jersey corporation can be lawfully issued only for

a fixed price, to which may be applied in part or full payment the wages or salaries which its employes might otherwise have earned, and not for a price compounded of cash and compensatory services, disregards both the law and the facts involved in the instant case. Immediately upon the issuance of the stock and delivery to the Guaranty Trust Company, as Trustee under the Agreement, the Guaranty Trust Company paid $25 per share for each and every share of stock so delivered to it. Thus, the Company received the par value of each and every share of stock. Further, the Company has received services during the entire year, services which were rendered in part upon the agreement that this stock should be delivered to those employes who were allotted stock under the Plan. Moreover, the very wording of the Act of 1920 authorizes the stock to be issued for "services", as it provides that a corporation "may carry out a plan" for "The issue * * * of its capital stock * * *, and the payment for such stock in installments or at one time with or without the right to vote thereon pending payment therefor in full, *and for aiding any such employees and said other persons in paying for such stock by contributions, compensation for services or otherwise.*"

Even before this statute was enacted, the Company had the right, under the decisions of the New Jersey courts, to issue its stock to employes for services to be performed. (*Vineland Grape Juice Co.* v. *Chandler,* 80 N. J. Eq. 437.)

IX.

The allotment of the stock, to be delivered only when the employe should have completed his services for the balance of the year and paid in cash the par value of the stock, was neither a violation of the directors' fiduciary obligation nor a waste of the Company's assets.

Plaintiff's discussion addressed to this point proceeds upon three erroneous assumptions.

First, he treats the case as though the directors, in making allotments of stock, were acting without authority and ignores the fact that at a special meeting called for the purpose, an overwhelming majority of the stockholders had *expressly* given authority to the directors to make such allotments to themselves as employes. All of the cases which plaintiff cites were cases in which directors had entered into contracts with themselves in the absence of such authority.

The rule in New Jersey and in the Federal courts, as well as in New York, is that the stockholders may, either by prior vote or by subsequent ratification, authorize the directors to deal with themselves and that under such circumstances the action of the directors is entirely valid. See *United States Steel Corporation* v. *Hodge,* 64 N. J. Eq. 807, 813-814; *Dana* v. *Morgan,* 219 Fed. 313, affd. 232 Fed. 85; *Ransome Concrete Machinery Co.* v. *Moody,* 282 Fed. 29; *Russell* v. *Patterson Co.,* 232 Pa. 113; *Colby* v. *Equitable Trust Co.,* 124 App. Div. 262, affd. 192 N. Y. 535; *Pollitz* v. *Wabash R. R. Co.,* 207 N. Y. 113.

This Court, in *Leavenworth* v. *Chicago &c., Railway Co.,* 134 U. S. 688, was confronted with the same contention as plaintiff makes here, that a transaction between a director and his corporation was void, despite the ratification by the stockholders. The Circuit Court had ruled against the plaintiff in that case and held that the ratification by stockholders was effective. In that case, as here, plaintiff relied upon *Aberdeen Railway Co.* v. *Blakie,* 1 Macqueen, H. L. 461; *Michoud* v. *Girod,* 4 How. 503; *Davoue* v. *Fanning,* 2 Johns. Ch. 252; *Wardell* v. *Railroad Co.,* 103 U. S. 651; *Twin Lick Oil Co.* v. *Marbury,* 91 U. S. 587,—of which this Court said (p. 708):

> "But, notwithstanding the general principle laid down in the cases cited, we concur in the views thus taken of the present case by the Circuit Court, and place our decision as to this branch of it on the same grounds."

Plaintiff asserts that the stockholders did not receive adequate notice, but we are unable to find in his discussion of this point any basis for such a conclusion. The Plan (a copy of which accompanied the notice of the meeting), expressly provided that "the Board of Directors may * * * by way of additional compensation for services to be rendered, offer and allot such stock for subscription, to employees * * * at such prices not less than the par value of the shares allotted * * * as shall be determined * * * pursuant to authority to be granted by the Board of Directors to the President for such purpose." It also provided that "no employee or person actively engaged in the conduct of the business of the corporation, or its subsidiaries, shall be deemed ineligible to the benefits of the Plan by reason of his being also a director * * *" (R., pp. 47-49). It would be difficult to draft a notice which would more clearly set forth the exact authority which was intended to be given to the directors.

Second, plaintiff's argument proceeds upon the further erroneous assumption that the directors should have allotted the stock to employes at a price as high as could be obtained in the open market; he ignores completely that what was submitted to the stockholders and approved by them was a Plan *for the benefit of employes* under which stock was to be allotted as stated in the Plan, *"by way of additional compensation."* Its eventual worth would depend on their services, so that they would realize that their own efforts would enhance its value.

Third, plaintiff also erroneously assumes that the market value of the stock on January 28, 1931 represented a profit to the allottees at that time. This is clearly not the fact. At that time the employes were merely permitted to subscribe to the stock allotted to them. There was no sale to them at that time, nor did title pass, nor any dominion over the stock (Exh. G, R., pp. 110-121; Pltff's Bill of Par., R., p. 251). No employe could receive stock until he had com-

pleted his services for the year 1931 and had also paid in full the par value in cash of the stock allotted to him.

Accordingly, plaintiff's contention that the allottees received a profit of $87 a share because the market price of the stock was $112 in January, 1931, is refuted completely by the facts. The employes could not under any circumstances become entitled to the stock until after December 31, 1931. Before the end of November, 1931, the market price of the stock had fallen to $71 per share (R., p. 194). We assume that this Court may take judicial notice that the period subsequent to November, 1931, was "one of continuous price recession." *Galveston Electric Co.* v. *Galveston,* 258 U. S. 388, 402. If the book value of the stock be taken into consideration, it is to be noted that in January, 1931, it was less than $42 a share (Exh. U, R., p. 179). Included in that valuation is $54,000,000 for brands, trademarks, patents and good will, which makes approximately $11 a share.

The price at which the stock was to be offered under the Plan was a matter which the stockholders had left with the directors for determination, and the events which have occurred since the date of the allotment have amply justified the wisdom of the directors' judgment in fixing such price at par.

In 1929 there had been a severe market break, and the directors had a right to foresee a likelihood of its repetition. There were then distinct signs of a great world depression and it was an act of highest sagacity to spur on the Company's man power towards unusual efforts to stem the tide of panics and slumps in safeguarding the interests of its stockholders. The morale of the Company's executives and employes has been its most valuable asset in its present fight against universal world conditions more disturbing than have ever faced the industry.

It is a matter of common knowledge that all tobacco companies were faced with agitation in a number of States for an increase of taxes upon tobacco products, all of which

might affect the business of the Company and the market value of its stock.

It is also a matter of common knowledge that during the past three years many corporations which have had employes' stock plans in effect have failed to make sufficient allowance for the downward trend of the market values of the stock. In the case of stock plans where the market price has fallen below the subscription price, the result has been not only financial loss instead of gain to the employes, but a corresponding discouragement and discontent, instead of the encouragement and stimulation which is the primary purpose of all such plans.

The plaintiff complains that the formula used in the allotment of the stock permitted the most valuable employes to subscribe for more stock than those who were less valuable, and resulted in allowing the chief executives to subscribe for a large proportion of the stock allotted. But the Plan, being a form of "additional compensation," necessarily carried with it the recognition of different degrees of worth. For example, an assistant factory superintendent should not and would not, in any well run business, receive the same compensation as his immediate superior; and this would apply throughout the entire personnel. Naturally, therefore, any formula to meet the requirements of the situation, should, when applied to the participants, result in the major officials receiving the greater proportion. Obviously, the stockholders must have known when they approved the Plan that the chief executives would receive much larger allotments than minor employes. While such allotments were large, the benefits to the Company, as already demonstrated, have been correspondingly great. The duties, responsibilities and services of these chief executives, and the burdens they carry, are described at length in the Answer (Fourth Separate Defense, R., pp. 205-239) and were all well known to the stockholders.*

* See page 10, *supra*.

This contention of plaintiff goes merely to a question of corporate policy with respect to which the plaintiff must abide by the expressed will of the great body of the stockholders of the Company, unless he wishes to avail himself of the right afforded to any dissatisfied minority stockholder of having his stock appraised and being paid such appraised value by the corporation (Laws of 1920, Chap. 175, § 2).

Plaintiff seems to believe that he, a single stockholder holding but 600 shares of Common Stock out of a total of 4,688,000 shares outstanding, is the one to determine what the compensation of the employes shall be and to how much each employe is entitled. He would take the management of the corporation not only from the directors but from the majority stockholders. He would disregard the law of New Jersey as laid down in *Bingham* v. *The Savings Investment Company,* 102 N. J. Eq. 302, in which the court said (p. 304):

> "A meeting was thereupon held for that purpose, at which the holders of eight thousand seven hundred and twenty-one shares out of a total issue of ten thousand were present; eight thousand five hundred and twenty-five shares being voted in favor of the agreement, and the holders of two hundred and eleven shares (being the complainants) voting against it. In other words, approximately eighty-three and eighty-five hundredths per cent. of the stock held by those in attendance was voted in favor of the adoption of the agreement and only two and eighty-five hundredths per cent. against it. In such a situation, as was stated by this court in *Berger* v. *United States Steel Corp.*, 63 N. J. Eq. 812, in considering a like contention made under similar conditions, it cannot reasonably be expected that the court is impressed with the belief that the complainants and their fellow-stockholders will suffer any substantial injury by the consummation of the scheme, and that unless it appears that the proposed action is without legal authority, this court should see to it that this overwhelming majority of shareholders are not deprived of their rights by the very few dissentients."

Plaintiff would confer either upon himself or upon the Court powers which clearly belong to the stockholders and as to which the stockholders constitute the court of last resort. (*Bisbee* v. *Midland Linseed Products Co.,* 19 Fed. (2d) 24; *Heinz* v. *National Bank of Commerce,* 237 Fed. 942; *Brictson Mfg. Co.* v. *Close,* 280 Fed. 297; *DuPont* v. *DuPont,* 256 Fed. 129; *Farmers Loan & Trust Co.* v. *Hewitt,* 94 N. J. Eq. 65; *Elevator Supplies Co.* v. *Wylde,* 106 N. J. Eq. 163; *Kelly* v. *Kelly-Springfield Tire Co.,* 106 N. J. Eq. 545; *Madsen* v. *Burns Bros.,* 108 N. J. Eq. 275; *Storrs* v. *James Butler Grocery Co.,* 96 N. J. Eq. 359; *General Investment Co.* v. *American Hide & Leather Co.,* 97 N. J. Eq. 214; *Putnam* v. *Juvenile Shoe Corp.,* 307 Mo. 74.)

X.

The resolutions authorizing allotment of the stock were made under the express authority conferred upon the directors by the stockholders.

Plaintiff again passes over the fact that what the directors did in making allotments was with the expressed consent of the stockholders. He also eliminates from consideration the full information promptly given by the board to the stockholders of the actual allotments, such information being contained in the pamphlet (Exh. G) mailed to stockholders early in March, 1931, accompanying the notices of the annual meeting to be held on April 1, 1931.

Indisputably, the stockholders knew when they voted for the Plan that under its terms the allotments were to be made by the board of directors and that if the Plan was approved, the directors who were employes would have authority to allot stock to themselves. Having this knowledge, the stockholders voted to give the directors such power and authority. No reason appears why this mandate of the stockholders should not be given its natural effect.

It has been already pointed out in Point III, *supra*, that plaintiff's theory, that directors who were employes were disqualified from voting for the preliminary resolution to submit the Plan to the stockholders, would automatically prevent any Plan under this Act from ever being submitted to the stockholders of a corporation, all or the majority of whose directors were employes, unless those important employes who are directors are excluded from its benefits.

It should now be noted that plaintiff's theory that directors who were employes were disqualified from voting for an allotment to themselves, notwithstanding the fact that the terms of the Plan approved by the stockholders expressly provided that director-employes might participate in the Plan, would prevent any New Jersey corporation the majority of whose directors were employes from ever making allotments under a plan containing such a provision. All of these contentions of plaintiff are the result of his refusal to recognize the well established rule that no such disqualification on the part of directors exists when the stockholders—with notice that the directors have an interest—have given authority to them to act.

For a number of years the Company's board has consisted almost entirely of executive employes. Obviously, the stockholders have the right to elect employes to the board, and no reason appears why a corporation whose stockholders follow such a policy should be precluded from taking advantage of the Act in question. Nor is there anything in the Act itself indicating any legislative intention to limit the right of stockholders in determining what employes might participate in the benefits of any such plan. On the contrary, the Act leaves full power with respect to the provisions of the plan in the hands of the stockholders.

McNab v. *McNab and Harlin Mfg. Co.*, 62 Hun 18, affd. 133 N. Y. 687, relied upon by plaintiff, is not applicable. In that case it appeared that there had been neither prior

authorization nor subsequent ratification by the stockholders. For the rule prevailing in the Second Circuit, see *Ransome Concrete Machinery Company* v. *Moody,* 282 Fed. 29.

Notwithstanding plaintiff has failed to assign as error the refusal of the District Court to strike out the Fourth Separate Defense, he urges that the facts therein set forth are wholly irrelevant.

He bases his argument upon the premise that the Plan, although adopted by the requisite vote of stockholders pursuant to the Act, nevertheless constitutes an illegal and wrongful act on the part of the defendants.

We believe we have fully demonstrated in this brief that the Plan was adopted in strict conformity with the Act and is legal and valid in all respects. Since the premises upon which the plaintiff bases his conclusion are without legal support, his conclusion must likewise necessarily fall.

Jacobson v. *Brooklyn Lumber Co.,* 184 N. Y. 152, cited by plaintiff, has no application. It did not involve any element of contract or agreement to pay for services to be rendered in the future. It was a case where directors were majority stockholders and were using that position for the purpose of depriving the minority stockholders of their rights.

The law is clear that, even in the case of a director, if he renders services not incidental to his duty as such, under agreement that he is to be paid therefor, he is entitled to compensation. (*Corinne Mill, Canal & Stock Co.* v. *Toponce,* 152 U. S. 405; *Fitzgerald and Mallory Construction Co.* v. *Fitzgerald,* 137 U. S. 98; *Montana Tonopah Mining Co.* v. *Dunlap,* 196 Fed. 612; *Bennett* v. *Millville Improvement Co.,* 67 N. J. L. 320; *Chandler* v. *Monmouth Bank,* 13 N. J. L. 255; *In re Gouverneur Pub. Co.,* 168 Fed. 113; *Wellington Bull & Co., Inc.* v. *Morris,* 132 Misc. 509, affd. 226 App. Div. 868; *Fox* v. *Arctic Placer Mining & Milling Co.,* 229 N. Y. 124; *Bagley* v. *The Carthage, W. & S. H. R. R. Co.,* 165 N. Y. 179.)

XI.

The allotment of the stock in January, 1931, "by way of additional compensation for services to be rendered" was authorized by the statute and by the Plan.*

Plaintiff again disregards the facts in asserting that the allotment on January 28, 1931, constituted a sale from which the 528 employes received a profit of $5,000,000. He goes so far as to state that the provision of the Subscription Agreement, made with the employes, that the allotment was "by way of additional compensation for services to be rendered by you to the Company and/or its subsidiaries to and including December 31, 1931," was, in the language of the plaintiff's brief (p. 30) "nothing more than a conveyancer's device invented to impart consideration into the transaction which was recognized as otherwise lacking of adequate consideration."

The statute by its express terms provides for the issue of the stock "to any or all of its employees and those actively engaged in the conduct of its business. * * * and for aiding any such employees and said other persons in paying for such stock by contributions, *compensation for services,* or otherwise."

The Plan itself contained, twice repeated, the specific provision that the allotment of stock to employes was to be made *"by way of additional compensation for services to be rendered"* (Plan, Pars. I and III, R., p. 47). Also, the notice of the special meeting of July 28, 1930, in addition to enclosing a copy of the Plan, referred to "the issuance and sale of the shares * * * to employees and those actively engaged in the conduct of its business, *by way of compensation for services to be rendered"* (R., p. 43).

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* This is a variation of Point VIII, *supra.* The only reason we discuss it again as a separate point is that plaintiff has so treated it.

Plaintiff's other grounds of objection to the allotment are wholly specious. The Act provided specifically that the allotment could be made to Trustees on behalf of the employes.

The Act provided, also, as did the Plan, that allotments could be made not only to "any or all employes," but also to "those actively engaged in the conduct of its business."

Conclusion.

Without complying with the rules necessary to give jurisdiction by first exhausting his remedies within the corporation, plaintiff has sought a forum foreign to the corporate domicile to adjudicate matters dealing with the internal affairs of the Company. He brings what he is pleased to call a representative action. No single stockholder has come forward to join his cause. Owning less than one one-hundredth of one percent of the Company's outstanding stock, he asks the courts to follow him in overriding the expressed wish of the overwhelming majority of the stockholders and determining in their stead what shall be done with the Company, what policies it shall pursue with respect to the compensation of its officers and employes, who constitute its directing head. We submit that in point of fact no less than in point of law, plaintiff's case must fail, and the decree should be affirmed.

Respectfully submitted,

JOHN W. DAVIS,
NATHAN L. MILLER,
Counsel for Respondents.

APPENDIX A.

Statute Under Which the Plan Was Authorized.

158. Power of domestic corporation to provide for participation of employees in purchase of stock, profits, welfare work or management.

Any stock corporation formed under any law of this state may, upon such terms and conditions as may be determined in the manner hereinafter designated, provide and carry out a plan or plans for any or all of the following purposes:

(a) The issue or the purchase and sale of its capital stock to any or all of its employees and those actively engaged in the conduct of its business or to trustees on their behalf, and the payment for such stock in instalments or at one time with or without the right to vote thereon pending payment therefor in full, and for aiding any such employees and said other persons in paying for such stock by contributions, compensation for services, or otherwise.

(b) The participation by all or any of its employees and such other persons in the profits of the corporate enterprise or of any branch or division thereof. Such share in such profits shall be regarded as a part of the corporation's legitimate expenses.

(c) The furnishing to its employees wholly or in part at the expense of such corporation of medical services, insurance against accident, sickness or death, pensions during old age, disability or unemployment, education, housing, social services, recreation or other similar aids for their relief or general welfare.

(d) The nomination and election by its employees of one or more thereof as a member or members of its board of directors, such member or members to have the same rights

and authority and be subject to the same duties and responsibilities as the directors to be elected by the stockholders. Every such corporation may determine and provide the manner of making any such nominations and calling and conducting any such election, the time or times, the place or places where it shall be held, what number of years of service or other qualifications shall entitle its employees to one or more votes, whether said votes shall be cast personally or by proxy, what number of votes shall be required to elect, and such other restrictions and conditions as may be deemed expedient and proper; *provided, however,* that the voting at all such elections shall be by secret ballot, and that if less than a majority of employees entitled to vote participate in the election, such election shall be inoperative and void. Any vacancy occuring in any such office by reason of a failure to elect or otherwise, shall be filled in the manner provided for in the plan, and in the absence of such provision such vacancy shall be filled from among the employees or stockholders by the board of directors. (L. 1920, ch. 175, p. 354, § 1; S. 47-183.)

158a. Manner of exercising privileges and powers granted by preceding section.

Any of the privileges and powers hereinbefore granted may be exercised in the manner following:

(a) By including appropriate clauses therefor in the original articles of incorporation or by-laws at the time of organizing the corporation.

(b) Where the corporation has been formed without the said charter or by-law provisions the board of directors shall first formulate such plan or plans and pass a resolution declaring that in its opinion the adoption thereof is advisable, and shall call a meeting of the stockholders to take action thereon. The stockholders' meeting shall be held upon

such notice as the by-laws provide, and in the absence of such provision upon ten days' notice given personally or by mail. If two-thirds in interest of each class of stockholders present at said meeting and voting shall vote in favor of any such plan or any modification thereof, the said plan shall thereupon become operative.

(c) In case any corporation shall hereafter adopt a plan providing for the issue of new stock under subdivision (a) of section 1 of this act, or any plan provided for in subdivision (d) of such section 1, any stockholder holding stock issued by such corporation before the enactment of this law, not voting in favor of such plan, may, within thirty days after the adoption thereof, file with the secretary of the company a dissent in writing therefrom. The person so dissenting shall within ten days after the filing of such dissent, and upon five days' notice to the corporation, apply by petition to the Circuit Court of the county in which the corporation has its principal office for the appointment of three disinterested appraisers to appraise the fair value of the stock held by such stockholders in said corporation and issued prior to the enactment of this law without regard to any depreciation or appreciation thereof in consequence of the adoption of such plan, whose award (or that of a majority of them) when confirmed by the said court, shall be final and conclusive on all parties, and said corporation shall pay to such stockholder the value of such stock as aforesaid. On receiving such payment, or on a tender thereof, or in case of any legal disability or absence from the state, on the payment of such award into said court, said stock shall be transferred to the said corporation, to be disposed of by the directors thereof or to be retained for the benefit of the remaining stockholders; and in case the said award is not paid within thirty days from the filing of said award and confirmation by said court and notice thereof to be given in the manner aforesaid unto such corporation, the amount of the award shall be

a judgment against said corporation, and may be collected as other judgments in said court are by law collected. Such court may fill any vacancy in the board of appraisers occurring by refusal or neglect to serve or otherwise. The charges and expenses of the appraisers and appraisal as approved by the court shall be paid by the corporation; *provided, however,* that the corporation may at any time before the proceedings hereinbefore mentioned are instituted or completed elect to permit such dissenting stockholder to subscribe for his proportionate share of such new stock issued under section one, subdivision a, in which event the said proceedings shall not be instituted, or, if instituted, shall be terminated upon the payment of the appraisal expenses as aforesaid by the corporation. (L. 1920, ch. 175, p. 355, § 2; S. 47-184.)

158b. Change or abolishment of plan adopted; restoration of moneys to employees.

Any plan adopted as aforesaid may be recalled, abolished, revised, amended, altered or changed in the same manner as is herein provided for its adoption; subject, however, to the restoration by the corporation of any moneys contributed by employees or those actively engaged in the conduct of the corporate business, and for which no stock or other equivalent has been issued. (L. 1920, ch. 175, p. 357, § 3; S. 47-185.)

158c. Privileges and powers conferred by act in addition to other powers and authority.

The privileges and powers conferred by this act shall be deemed to be in addition to and independent of any and all powers and authority conferred by any other law or laws, and not in restriction or limitation of any of the powers now permitted to corporations of this state. (L. 1920, ch. 175, p. 357, § 4; S. 47-186.)

APPENDIX B.

Decree Entered on Mandate.

At a Stated Term of the United States District Court for the Southern District of New York, held at the Post Office Building, in the Borough of Manhattan, City of New York, on the 11th day of July, 1932.

Present—Hon. ROBERT P. PATTERSON, District Judge.

RICHARD REID ROGERS, *Plaintiff,* against GUARANTY TRUST COMPANY OF NEW YORK, JUNIUS PARKER, GEORGE W. HILL, C. F. NEILEY, A. C. MOWER, VINCENT RIGGIO, CHARLES A. PENN, J. B. HARVIE, R. J. BOYLAN, C. S. KEENE, J. K. FLETCHER and THE AMERICAN TOBACCO COMPANY, *Defendants.*	Consolidated Cause. E—59-307.
RICHARD REID ROGERS, *Plaintiff,* against THE AMERICAN TOBACCO COMPANY and T. R. TAYLOR, *Defendants.*	

A decree in the above-entitled consolidated cause having been entered in this Court on the 23rd day of February, 1932, in favor of the defendants Guaranty Trust Company of New York, Junius Parker, George W. Hill, Vincent Riggio, J. B.

Harvie, R. J. Boylan, T. R. Taylor, and The American Tobacco Company, denying plaintiff's motion for an order to strike out the first, second, third, and fourth separate defenses of the answer therein, and for a decree in accordance with the prayer of the amended bill of complaint therein, or, in the alternative, for an order for an injunction *pendente lite,* the said decree having dismissed each of the bills of complaint therein without prejudice to the enforcement of the rights of plaintiff, if any, in the courts of New Jersey, and plaintiff having taken an appeal from the said decree to the United States Circuit Court of Appeals for the Second Circuit, from which a mandate has duly issued to this Court affirming said decree of this Court, and it appearing from the decision of the said Circuit Court of Appeals that the said cause was adjudicated by said Circuit Court of Appeals in favor of the said defendants on the merits, it is hereby

ORDERED, that the defendants Guaranty Trust Company of New York, Junius Parker, George W. Hill, Vincent Riggio, J. B. Harvie, R. J. Boylan, T. R. Taylor and The American Tobacco Company have judgment against the plaintiff Richard Reid Rogers that each of the bills of complaint herein be and the same is hereby dismissed with $25 costs, which costs will be fixed by the Clerk against the said plaintiff, and for which, if not paid in ten days, execution will issue upon the application of any party in interest.

ROBERT P. PATTERSON,
U. S. D. J.

CORRECTED COPY

SUPREME COURT OF THE UNITED STATES.

No. 227.—October Term, 1932.

Richard Reid Rogers, Petitioner, *vs.* Guaranty Trust Company of New York, Junius Parker, George W. Hill, et al.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[January 23, 1933.]

Mr. Justice Butler delivered the opinion of the Court.

Petitioner, plaintiff below, owns 200 shares of the common stock of The American Tobacco Company which he acquired prior to the passage of c. 175, New Jersey Laws, 1920, that is here involved. He also owns 400 shares of common stock B. He brought two suits in the supreme court of New York: one against the tobacco company and some of its directors, the other against the trust company, Junius Parker and others. On application of defendants both were removed to the federal court for the southern district of that State. The first was discontinued as to some defendants and the cases were consolidated. The defendants before the court are the two companies, Parker, and five of the 17 directors of the tobacco company including its president, one of its vice presidents and its secretary.

The tobacco company was organized under the laws of New Jersey, and in that State maintains its "principal and registered office" as designated in its charter, holds the stockholders' meetings and does a substantial amount of business. It is authorized by the laws of New York to do business there and has in New York City its principal place of business where its directors usually meet, its executives have their offices and most of its records are kept. It carries on business in that and many other States and also in a number of foreign countries.

The grievances alleged by plaintiff concern the issue, allotment and sale of stock of the tobacco company. June 25, 1930, the board of directors adopted a resolution recommending the reduction by

one-half of the par value and the doubling of the number of shares of its common stock and common stock B. It had outstanding 526,997 shares of preferred stock and, as a result of action in accordance with that recommendation, 1,609,696 shares of common and 3,077,320 shares of common B. And by another resolution the board advised approval by the stockholders of a plan for the issue and sale of common stock B to employees pursuant to c. 175, New Jersey Laws, 1920.[1] The plan submitted accords to such employees and others actively engaged in the conduct of the business as may be selected an opportunity to purchase stock "by way of additional compensation for services to be rendered", and allots for subscription shares of unissued stock. The board may offer stock to such persons in the service at prices not less than par and upon other terms and conditions determined by the president pursuant to authority granted him for that purpose by the board. No employee or person actively engaged in the conduct of the business of the corporation or its subsidiaries shall be deemed ineligible to its benefits by reason of being also a director of the corporation or of any of its subsidiaries or of holding any office therein.

July 28, 1930, the stockholders adopted the plan. And January 28, 1931, the board authorized a sale of 56,712 shares of common stock B at par value of $25 per share. It directed that there be

[1]Section 1 of that Act provides for the participation of employees in purchase of stock, profits, welfare work and management of any corporation organized under the laws of the State, and declares: "Any stock corporation . . . may, upon such terms and conditions as may be determined in the manner hereinafter designated, provide and carry out a plan or plans for any or all of the following purposes: (2) The issue or the purchase and sale of its capital stock to any or all of its employees and those actively engaged in the conduct of its business or to trustees on their behalf, and the payment for such stock in installments or at one time with or without the right to vote thereon pending payment therefor in full, and for aiding any such employees and said other persons in paying for such stock by contributions, compensation for services, or otherwise". And § 2 provides: "The board of directors shall first formulate such plan or plans and pass a resolution declaring that in its opinion the adoption thereof is advisable, and shall call a meeting of the stockholders to take action thereon. . . . If two-thirds in interest of each class of stockholders present at said meeting and voting shall vote in favor of any such plan or any modification thereof, the said plan shall thereupon become operative." And that section gives to any dissenting stockholder the right upon surrender to receive from the company the appraised value of any stock that was acquired before the passage of the Act.

furnished to the president, to be considered in determining to whom the stock should be allotted for purchase, a list showing the services rendered and, having regard to the value of the same, the rating on a percentage basis given to each together with the total amount of his compensation for 1930. It recommended that the basis of distribution should be the number of shares having par value equal to one-third of that year's compensation to each allottee rated at 100 per cent. and correspondingly less to those having lower ratings. And there was accorded to each of 535 employees, including directors and others active in the business, the right to subscribe for the new stock on that basis. All the shares allotted were sold at $25 for cash to the trust company. The trust company allowed each allottee to subscribe at the same price. At that time it was worth $112. The agreement stated that this was by way of additional compensation for service to be rendered between January 31 and December 31, 1931, that until the end of the year no allottee could take up his stock, that he was entitled to have dividends applied on the purchase price and that if he should terminate his employment before the end of the year the trustees were to decide whether he should have his allotment.

The complaint attacked the transaction upon the following grounds: The directors being disqualified by reason of their interest as allottees, the plan was not passed by a valid vote or adopted as required by c. 175. The subsequent vote of the stockholders, required by the statute to be predicated upon action by the board, was likewise invalid. The plan was *ultra vires* in that the allotment "by way of additional compensation for services to be rendered" violated c. 195, New Jersey Laws, 1917. Under the company's charter and the statutes of New Jersey—§ 224, General Corporation Law as added by § 16 of c. 318, Laws 1926—every stockholder had the right according to the number of his shares to have pro rata distribution of the stock in question. And the complaint prayed decree that the defendants be enjoined from carrying out the plan, that the stock be declared void and canceled, and that the defendants, other than the tobacco company, be held for costs and damages sustained by that company.

Four defenses were set up: Plaintiff failed to comply with Equity Rule 27. The stockholders including plaintiff ratified the allotments to the directors. The suit is an attempt to regulate the

internal affairs of a corporation foreign to New York, and the United States district court sitting therein should decline to take jurisdiction. The allotments were fair and reasonable and were made in accordance with the company's by-laws and the statutes of New Jersey. Plaintiff moved for an order striking out the defenses as insufficient and for a decree in accordance with the prayer of the complaint or, in the alternative, for an injunction *pendente lite* preventing the carrying out of the plan.

The district court filed an opinion in which it said:

> "In the present case, the validity of the shares sought to be cancelled depends primarily upon the interpretation and effect of the act of 1920. The directors cited this statute as their authority for the plan when they formulated it and have all along insisted that the plan is in conformity with the statute. The plaintiff takes the position that the statute is not applicable and has been used by the directors merely as a cover for a raid upon the corporate treasury for their own profit. In addition, plaintiff submits that two other statutes, that of 1917 and that of 1926, must be taken as limiting the operation of the 1920 act. It is obvious that the case presents not merely questions of fact but questions of some complexity under the New Jersey laws. There seem to be no decisions of the New Jersey courts to serve as a guide in the proper construction and possible interrelation of these statutes. The legality of the corporate proceedings which resulted in the issuance of this stock is peculiarly a matter for determination in the first instance by the New Jersey courts. It may be noted that the American Tobacco Company is not a local enterprise. While its chief office is said to be here and it unquestionably carries on business here, its activities are known to be world-wide. It has a New Jersey charter; it refers to the New Jersey office as its principal office; it holds its stockholders' meetings there. It is not a resident corporation in any sense of the word".

And it entered judgment denying the motion and that "in the exercise of this Court's discretion, each of the bills of complaint herein be and the same are hereby dismissed, without prejudice to the enforcement of the rights of plaintiff, if any, in the courts of New Jersey".

The Circuit Court of Appeals, 60 F. (2d) 114, dealing with plaintiff's contentions before it, held that the plan was authorized, that the stock was lawfully issued under New Jersey statutes, and that for the reasons given in the opinion the bill was properly dis-

missed. A dissenting opinion suggests that the plan was not sufficiently in detail to comply with the New Jersey statute. The court affirmed the judgment appealed from, and upon its mandate the district court entered a decree that the bills of complaint be dismissed with costs.

Among the points and contentions raised and pressed by plaintiff in his petition for certiorari and argument here are the following: The plan is not definite and formulated as required by c. 175. That chapter as construed below is repugnant to the contract clause of the federal Constitution. The decision that the plaintiff failed to comply with Equity Rule 27 is contrary to c. 175. Chapter 195, New Jersey Laws 1917, does not permit the issue of stock to employees for services to be rendered. The decree of the district court declining to exercise jurisdiction is contrary to decisions of this court and in conflict with the decision of the Circuit Court of Appeals for the Seventh Circuit in *Williamson* v. *Missouri-Kansas Pipe Line Co.*, 56 F. (2d) 503.

The authorization, allotment and sale of the shares in question involved the proportionate ownership of stockholders and their rights *inter sese*. Unquestionably the steps taken and proposed to formulate and carry out the plan constitute the conduct and management of the internal affairs of the tobacco company. The controversy is solely between the plaintiff and other stockholders not participating in the distribution on one side and the purchasers of the new stock, the corporation, its directors and officers on the other. When, by acquisition of his stock, plaintiff became a member of the corporation he, like every other shareholder, impliedly agreed that in respect of its internal affairs the company was to be governed by the laws of the State in which it was organized. His rights, whatever the tribunal chosen for their vindication, are to be determined upon the ascertainment and proper application of New Jersey law.

It has long been settled doctrine that a court—state or federal—sitting in one State will as a general rule decline to interfere with or control by injunction or otherwise the management of the internal affairs of a corporation organized under the laws of another State but will leave controversies as to such matters to the courts of the State of the domicile. *Wallace* v. *Motor Products Corporation*, 25 F. (2d) 655, 658. *Chicago Title & Trust Co.* v. *Newman*,

187 Fed. 573, 576. *Eberhard* v. *Northwestern Mutual Life Ins. Co.*, 210 Fed. 520, 522. *Powell* v. *United Association*, 240 N. Y. 616. *Sauerbrunn* v. *Hartford Life Ins. Co.*, 220 N. Y. 363, 371. *Jackson* v. *Hooper*, 76 N. J. Eq. 592, 604. *Guilford* v. *Western Union Telegraph Co.*, 59 Minn. 332, 340. *Kimball* v. *St. Louis, &c. Railway*, 157 Mass. 7. *Hogue* v. *American Steel Foundries*, 247 Pa. 12, 15. *Babcock* v. *Farwell*, 245 Ill. 14, 33, *et seq.* *Clark* v. *Life Association*, 14 App. D. C. 154, 179-180. *North State Copper and Gold Mining Co.* v. *Field*, 64 Md. 151. Cf. *Burnrite Coal Co.* v. *Riggs*, 274 U. S. 208, 212-213. While the district court had jurisdiction to adjudge the rights of the parties, it does not follow that it was bound to exert that power. *Canada Malting Co.* v *Paterson Co.*, 285 U. S. 413, 422, and authorities cited. It was free in the exercise of a sound discretion to decline to pass upon the merits of the controversy and to relegate plaintiff to an appropriate forum. *Langnes* v. *Green*, 282 U. S. 531, 535, 541. *Heine* v. *New York Life Ins. Co.*, 50 F. (2d) 382. Obviously no definite rule of general application can be formulated by which it may be determined under what circumstances a court will assume jurisdiction of stockholders' suits relating to the conduct of internal affairs of foreign corporations. But it safely may be said that jurisdiction will be declined whenever considerations of convenience, efficiency and justice point to the courts of the State of the domicile as appropriate tribunals for the determination of the particular case. *Cohn* v. *Mishkoff Costello Co.*, 256 N. Y. 102, 105. *Travis* v. *Knox Terpezone Co.*, 215 N. Y. 259, 263. *Kimball* v. *St. Louis, &c. Railway, supra.*

The complaint shows that as of its date seven directors of the tobacco company were not residents of New York. Only six allottees are before the court. The others, over 525, are not mentioned in the complaint. It appears from the answer that many of them are outside New York, and it may be inferred that a large number of them reside in the other States and countries in which the company does business. At the time, February 23, 1932, of the dismissal of the bill the services of the employees, for which the allotments constitute part compensation, had been fully performed and they were entitled to have and presumably they, or at least some of them, had secured the delivery of the shares so allotted to them. As the tobacco company, in addition to its

registered office, has property, operates directly or through subsidiaries branch factories in New Jersey and carries on business there and in other States and countries, it may not be deemed to have been organized in that State as a mere matter of convenience for the purpose of carrying on all its business in another State or be deemed in New York to be a local concern. This case is wholly unlike *Williamson* v. *Missouri-Kansas Pipe Line Co., supra,* relied on by plaintiff.

The determination of plaintiff's contentions requires not only the ascertainment of the true meaning and intent of c. 175 of New Jersey Laws, 1920, but also its constitutional validity. Its provisions have never been construed by the New Jersey courts and they or their like are not familiar in the statute law governing corporations organized in other States. And other New Jersey statutes among which are c. 195, Laws of 1917, and c. 318, § 16, Laws of 1926, are claimed by plaintiff to have an important bearing upon this case. But the courts of that State have had no occasion to consider the interrelation, if any, between them and c. 175 pursuant to which the stock in question purports to have been issued to employees. A mere inspection of the New Jersey statutes directly involved suggests grave doubts as to their proper application to the facts in this case and the difference of opinion expressed below confirms that impression.

So far as concerns the cancelation of the allotted shares and other relief sought by plaintiff the situs of the stock is in New Jersey and all questions relating to the validity of the plan, authorization, issue, allotment and sale of the same may be conveniently and effectively determined in New Jersey courts, the authoritative and final interpreters of the statutes of that State. A proceeding *in rem* is authorized, process therein may be served by publication and a decree, final and binding upon all, canceling or sustaining the stock may readily be enforced. New Jersey Practice Act of 1903, § 84. *Jellenik* v. *Huron Copper Company,* 177 U. S. 1, 13. *Andrews* v. *Guayaquil & Quito Ry. Co.,* 69 N. J. Eq. 211. *Holmes* v. *Camp,* 219 N. Y. 359. The facts and circumstances disclosed by the record clearly bring this case within the general rule and abundantly justify the exercise of discretion on the part of the district court in dismissing the bills of complaint without prejudice. As the Circuit Court of Appeals considered

and decided the merits of the case, its judgment is reversed, the judgment of the district court entered upon its mandate is vacated and the case will be remanded to the district court with directions to reinstate the earlier judgment dismissing the bills of complaint without prejudice.

It is so ordered.

Mr. Justice ROBERTS took no part in the consideration or decision of this case.

A true copy.

Test:

Clerk, Supreme Court, U. S.

SUPREME COURT OF THE UNITED STATES.

No. 227.—October Term, 1932.

Richard Reid Rogers, Petitioner, *vs.* Guaranty Trust Company of New York, Junius Parker, George W. Hill, et al.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[January 23, 1933.]

Mr. Justice Stone.

I think the Court should decide this case on its merits in favor of the petitioner.

Respondent, the American Tobacco Company, organized under the laws of New Jersey, is a large and prosperous corporation, engaged in the manufacture and distribution of cigarettes and other forms of tobacco. It has upwards of 40,000 stockholders. At the commencement of this suit it had a board of 16 directors, including a president, five vice presidents, a secretary and a treasurer, all actively engaged in its management. For many years these officers have received large annual fixed salaries, as well as large annual cash profit sharing bonuses paid under a by-law of the company, adopted in 1912. See *Rogers* v. *Hill*, 60 F. (2d) 109. In the year 1930, the profit sharing bonus of the president, added to his fixed salary of $168,000, gave him a total compensation of over $1,010,000, which was further augmented by a special "credit" of $273,470. In the same year, four of the five vice presidents received an aggregate annual salary and bonus of more than $2,077,000. In addition, a number of stock subscription plans have from time to time been put into operation by the directors, without authority of the charter or by-laws of the corporation, or the knowledge or approval of its stockholders, by which they largely benefited. In that of 1926, the respondent Hill, the president and also a director of the company, acquired 8,000 shares of common stock, and other directors, who are respondents here, received substantial amounts. In that of 1929, one year before the transactions now complained of, 46,500 of 51,750 shares

of common stock, purchased by the corporation and set aside for the purpose, were sold to the corporate directors at $47 per share less than market value. Convenient arrangements were made for postponed payment of the purchase price. Respondents received 23,050 shares, of which the president received 15,050.

On January 28, 1931, a new allotment of stock was made, which is the subject of this litigation. On that day, the Board of Directors (the president and officers constituting a majority of those in attendance) considered and passed upon the adequacy of the compensation which its members were then receiving for their services to the corporation, and the necessity of conferring further benefits on themselves in order to insure the continuance of those services. Having resolved these questions in their own favor, they proceeded to award additional benefits in the form of the privilege to subscribe to unissued common stock B of the corporation, at a small fraction of its market value. By resolution of that date, they put into effect a stock subscription plan by which 56,712 shares of unissued common stock B of the corporation were distributed in accordance with recommendations made by the president. Of this number 32,370, more than half, were allotted to the directors, of which 13,440 were allotted to the president. The remaining 24,342 shares were allotted in relatively small amounts to 525 employees. None of the recipients was of lower rank than factory subassistant. Four hundred and seventy-three received allotments of less than 100 shares each, the great majority receiving from 15 to 50 shares. The stated consideration for issue of the stock was a subscription price of $25 per share, the par value, and the services of the allottee, not specifically described, to be rendered to the American Tobacco Company for the remainder of the year.

The certificates of stock were to be delivered to the respondents, the Guaranty Trust Company of New York and an individual, as trustees. They were authorized to borrow money upon them to the extent of $25 per share, in order to effect immediate payment of the subscription price to the Tobacco Company, to apply dividends received on account of the purchase price to be paid by the allottees and to deliver the certificates to them after the close of the year, upon payment in full of their subscriptions. They were given discretion to waive performance of the stipulated service by any allottee and in the event that the subscriber was dis-

charged or resigned from the employ of the company within the year, to cancel the subscription agreement or not, as they pleased.

On the day of the resolution allotting the stock, its market price was $112 per share, more than four times the subscription price. It was then paying, and has ever since paid, dividends at the rate of $5 per year, sufficient to pay the subscription price in five years. Valuing the subscription privilege by the difference between the subscription price and the market value of the shares, the president received by the allotment the equivalent of $1,169,280, in addition to his annual compensation of more than $1,000,000. The stock subscription rights awarded the five vice-presidents, similarly valued, amounted to $1,451,595. That the subscription privilege, accorded for the avowed purpose of assuring the continuance of these executives in the company's employ, was then and has been ever since of great value, upon any theory of valuation, is not questioned.

Conceiving himself aggrieved by this transaction, petitioner, a non-assenting stockholder, brought two suits in the Supreme Court of New York, the state in which he resides, joining as defendants the American Tobacco Company, the trustees of the allotted stock, and certain of the directors, including the president, secretary, treasurer and five vice presidents, one of whom has since died and two of whom were not served with process. Included in the relief sought was a decree that the corporation, its officers and directors be enjoined from carrying out the stock allotments and that the stock allotted to the directors be surrendered to the Company. On motion of defendants, the Tobacco Company and a non-resident director, the causes were removed to the District Court for Southern New York, on grounds of diversity of citizenship of the parties to a separable controversy, and there consolidated.

Thus called upon in this suit to account for their stewardship and to justify their action, the defendants, the respondents here, place their whole reliance upon a statute of New Jersey in conformity with which, they contend, they secured, in advance, the authorization of the stockholders to make the challenged allotments of stock.

Section 1, c. 175, of the New Jersey Laws for 1920, authorizes any New Jersey corporation to provide and carry out a plan for "(a) the issue or the purchase and sale of its capital stock to any

or all of its employees and those actively engaged in the conduct of its business or to trustees on their behalf . . . and for aiding any such employees or said other persons in paying for such stock by contribution, compensation for services or otherwise, . . ." Section 2 (b) provides that where, as in this case, the corporation has been formed without charter or by-law provisions authorizing the issuance or the purchase and sale of stock for such purposes, "the board of directors shall first formulate such plan or plans and pass a resolution declaring that in its opinion the adoption thereof is advisable and shall call a meeting of the stockholders to take action thereon . . .". It requires an affirmative vote of two-thirds in interest of each class of stockholders, present at the meeting, for the adoption of the plan.

In June, 1930, the directors, purporting to act under this statute, presented to the stockholders, by notice of a special meeting, a so-called "plan" under which the employees of the corporation and those actively engaged in its business were to be permitted to subscribe to unissued shares of its common stock B. The notice of the meeting was accompanied by a document designated "Employees' Stock Subscription Plan", and by a copy of resolutions of the board of directors authorizing the submission of the plan to the stockholders, proposing a reduction in the par value of the common stock and the non-voting common stock B from $50 to $25 per share, and an increase of the authorized common stock from 1,000,000 to 2,000,000 shares, and of the authorized common stock B from 2,000,000 to 4,000,000 shares, each stockholder to receive two shares of the new stock for one of the old. By thus increasing the authorized, unissued shares of common B, stock was to be made available for subscription by employees.

The Employees' Stock Subscription Plan proposed "to allot for subscription . . . by way of additional compensation for services to be rendered, shares of unissued common stock B . . . to such employees of the corporation and/or its subsidiaries and those actviely engaged in the conduct of its or their business as may be selected . . . ". The prescribed method of execution of the plan was that "the Board of Directors may, at such time or times as it may determine . . . offer and allot such stock for subscription . . . in such amounts and proportions, to such persons, at such prices, not less than the par value of the shares al-

lotted, payable in full or in such installments, and upon such other terms and conditions, all as shall be determined with respect to each offering of stock to each individual pursuant to authority to be granted by the Board of Directors to the President for such purpose."

Accompanying the notice of the meeting was a circular letter by the president to stockholders, in which they were told of the prosperous condition of the company, that the purpose of the stock allotment plan was to encourage those who had made the company's success possible to continue in its employ, and that it was the expectation of the Board of Directors, if the program set forth in the notice of the meeting and accompanying documents should be approved by stockholders, to declare an extra dividend of $4 per share on the common stock and common stock B, and to initiate regular quarterly dividends on the newly authorized shares of common stock and common stock B at the increased annual rate of $5 per share. The letter closed with a request to sign and return the enclosed proxy, thereby indicating "your approval of the proposed steps and your support of your Company's management".

Moved, perhaps, by these inducements, the proposal was approved at the meeting by vote of the requisite number of shares of each class.

No disclosure was made to the stockholders by the officers and directors of the stock subscription plans previously put into operation by them, without authority of the charter or by-laws or the knowledge and approval of the stockholders. No disclosure was made of the number or amounts of the annual cash bonuses which had been paid to the president and vice presidents of the company, under the by-law adopted in 1912, and never, so far as appears, subsequently mentioned to the stockholders until after the stock allotments here involved. The only hint of the intention of the management to participate in the proposed Employees' Stock Subscription Plan was contained in a single sentence appearing in the Plan: "No employee, or person actively engaged in the conduct of the business of the Corporation, or its subsidiaries, shall be deemed ineligible to the benefits of the Plan by reason of being also a director of the Corporation or of any of its subsidiaries or of holding any office therein."

With all these facts presented by the pleadings, the district court, acknowledging its jurisdiction both as a federal court and a court of equity to decide the cause on its merits, nevertheless, held that as the suit concerns the internal affairs of a New Jersey corporation, discretion should be exercised to dismiss it without prejudice to its maintenance in the courts of New Jersey. On appeal, the Circuit Court of Appeals for the Second Circuit, Judge Swan dissenting, considered the merits and upheld the legality of the stock allotments. The decree of dismissal was affirmed on the merits and the trial court has entered a final decree accordingly. This Court now reverses that judgment, reestablishing the original decree of the trial Court, on the ground that a proper exercise of judicial discretion requires that the cause should not be heard. Thus after approximately two years of litigation in state and federal courts, all of which could, and I think should, have decided the case on the merits, the plaintiff must now start the litigation afresh in the courts of New Jersey.

In determining whether the federal courts should decline to exercise the jurisdiction conferred on them by removal, the nature of this controversy and its merits cannot be ignored. I do not stop to consider numerous objections to the stock allotments, urged by petitioner, which are not without weight. It suffices for present purposes that no plan of sufficient definiteness to comply with the New Jersey statute was ever submitted to the stockholders for their approval; and that even if it be conceded that a "plan" was approved, the action of the directors in alloting the stock to themselves, in violation of their duty as fiduciaries, exceeded the authority conferred upon them by the stockholders, and was, therefore, *ultra vires*.

The statute directs that the board of directors shall "first formulate such plan", declare it "advisable", and call a meeting of stockholders to act on it. Without presenting for the consideration of the stockholders any workable plan of stock allotment, the directors, in effect, asked the stockholders to confer plenary authority on them to formulate a plan and to carry it into execution without any disclosure of its provisions. After the meeting, as before, no stockholder, not in the confidence of the directors, knew in what the plan consisted, who were the persons to participate in it, what principle was to control their selection or determine the amount of

stock they were to receive, or the price they were to pay. It is a misuse of words of plain meaning to speak of such a proposal as a "plan", much less a formulated plan for stock allotment to employees, or as one which, in the form presented to the stockholders, the directors could have pronounced advisable or have carried into operation. It was no more than an invitation to stockholders to abrogate the discretion which the statute vested in them to approve a formulated plan, having at least some aspects of definiteness, and vest in the directors powers which could be conferred on them only by charter amendment in the manner prescribed by the statute. The invitation was accompanied by a skillfully phrased suggestion that it was necessary to accept it in order to hold the services of employees, and that, if accepted, the directors would cause new benefits to flow into the pockets of stockholders in the form of extra and increased dividends. Such a maneuver cannot rightly be regarded as a compliance with the plain language of the statute, which requires the directors first to formulate a plan for stock allotment and declare it advisable, and then to submit it to the stockholders for their approval. If it were, it would be difficult to suggest any conceivable purpose of the statute which could not be thwarted by a similar procedure.

The respondents stand in no better position, even if we assume that the proposal submitted to the stockholders was a formulated plan, within the meaning of the New Jersey statute. For in that case, authority for the directors' action must be found in the stockholders' approval of the proposal which they submitted, and we must interpret the proposal and the action taken by the stockholders in terms of their legitimate expectation that the directors were complying with their duty as fiduciaries and not dealing with them at arm's length. They were entitled to read the proposal in the light of the fundamental duty of directors to derive no profit from their own official action, without the consent of the stockholders, obtained after full and fair revelation of every circumstance which might reasonably influence them to withhold their consent. *Wardell* v. *Railroad Co.*, 103 U. S. 651; *General Investment Co.* v. *American Hide & Leather Co.*, 97 N. J. Eq. 230, 233; see *United States Steel Corp.* v. *Hodge*, 64 N. J. Eq. 807, 813; *Globe Woolen Co.* v. *Utica Gas & Electric Co.*, 224 N. Y. 483, 489; compare *Meinhard* v. *Salmon*, 249 N. Y. 458; *Wendt* v. *Fischer*,

243 N. Y. 439. They were entitled to assume that the proposal involved nothing which did not fairly appear on its face and above all that it was not a cloak for a scheme by which the directors were to enrich themselves in great amounts at the expense of the corporation, of whose interests they were the legal guardians.

The respondents must, therefore, rest their case on the bare statement in their proposal to the stockholders that no employee or person actively engaged in the business of the company "shall be deemed ineligible to the benefits of the plan", because a director or officer. But it would be extravagant to say that these words, addressed by men in the position of trustees to their beneficiaries, gave warning of the wholesale gratuities which the directors subsequently bestowed upon themselves. No more extensive authority could be derived from this language than the disclosure which it made. By consenting that the directors should be "eligible" to share in a plan avowedly for the benefit of employees, the stockholders did not consent that they should be the chief beneficiaries of their own unrestrained munificence, or that they should add any new bounties to the unrevealed stock allotments and bonuses which the directors had previously enjoyed in secrecy. Even if the stockholders consented that some of the directors should be eligible to benefit from action taken by other disinterested directors, they certainly did not consent that the allotments should be made by a group of directors who, because of the magnitude of the benefits they anticipated for themselves, were obviously incapable of passing an independent and unbiased judgment upon the propriety of the distribution which they cooperated in making to each other. Respondents' contention that if the directors were unable to vote on each other's participation no plan could be put into effect under which a majority of the directors were to participate, is without weight, for it obviously could be if the statute were followed and the plan revealed in its entirety to the stockholders.

To surmount these difficulties, respondents point to the fact that a representative of petitioner stated at the stockholders' meeting that favorable action on the proposal might result in the issuance of a large amount of stock to employees, including officers and directors, without adequate consideration, and that this did not induce the stockholders to express their disapproval. It is unnecessary to speculate whether this outcome is to be attributed to

the fact that those present, being without the aid of prevision, regarded the prediction as too improbable to be credited, or to the fact that those who attended the meeting were not, for the most part, the stockholders, but the recipients of their proxies selected by the management of the corporation for the occasion. A statement made to them would, as a New Jersey court has said, fall "upon ears not allowed to hear and minds not permitted to judge; upon automatons, whose principals are uninformed of their own injury". See *Berendt* v. *Bethlehem Steel Corp.*, 108 N. J. Eq. 148. 151. In any event it is enough that neither in the notice of meeting and accompanying documents, which the stockholders saw and on which they relied, nor at the meeting itself, did the officers and directors disclose that such was their purpose.

We need not conjecture whether, if the directors had had the hardihood to disclose in advance the benefits which they were to award to themselves, the stockholders would nevertheless have given their approval. Nor is it important that these directors have successfully managed the corporation and that under their direction it has earned large profits for its stockholders. Their business competence did not confer on them the privilege of making concealed or unauthorized profits or relieve them of the elementary obligation which the law imposes on all corporate directors to deal frankly and openly with stockholders in seeking their consent to benefit personally by reason of their relationship to the corporation.

The directors, having failed to comply with petitioner's seasonable demand that they exercise their authority to bring this suit in the name of the corporation, petitioner was not required by general equitable principles or by Equity Rule 27 to appeal to the stockholders before bringing it, as the action complained of here was not one which the stockholders could ratify. *Continental Securities Co.* v. *Belmont*, 206 N. Y. 7, 17; cf. *Delaware & Hudson Co.* v. *Albany & Susquehanna R. R. Co.*, 213 U. S. 435. Authority of the directors to bestow gratuities upon themselves in the form of subscription rights must be found in a plan approved in advance as the statute provides, by two-thirds of each class of stock. If no plan was presented to stockholders, as I think was the case, the entire stock issue was *ultra vires* and cannot be ratified any more than any other unauthorized disposition of corporate assets. If

the proposal to the stockholders is regarded as a plan, so far as ordinary employees are concerned, as it plainly does not embrace authority to the directors to confer such extravagant benefits upon themselves, the result is the same, as to the stock allotted to the directors.

I cannot agree that a proper exercise of discretion requires us to deny to the petitioner the relief to which he is so clearly entitled. This is the first time that this Court has held that a federal court should decline to hear a case on the ground that it concerns the internal affairs of a corporation foreign to the state in which it sits. We may assume, without deciding, that neither a federal nor a state court of equity will, as a general rule, undertake to administer the internal affairs of a foreign corporation. But the case before us is, in this respect, unlike a suit to dissolve the corporation and wind up its affairs, *Wallace* v. *Motor Products Corp.*, 25 F. (2d) 655, 658; *Pearce* v. *Sutherland*, 164 Fed. 609; *Maguire* v. *Mortgage Co. of America*, 203 Fed. 858; cf. *Burnrite Coal Co.* v. *Riggs*, 274 U. S. 208, 212; or compel the declaration of a dividend, *Cohn* v. *Mishkoff Costello Co.*, 256 N. Y. 102, or interfere with the election of officers or the meetings of shareholders or directors. *Wason* v. *Buzzell*, 181 Mass. 338; *State ex rel. Lake Shore Tel. & T. Co.* v. *De Groat*, 109 Minn. 168; see *Travis* v. *Knox Terpezone Co.*, 215 N. Y. 259, 263.

We are presented with no problem of administration. The only relief which the petitioner merits on the record before us or which he asks here is a decree that certain directors, now before the Court, restore to the treasury of the corporation, also before the Court, certain shares of stock alleged to have been illegally issued to them, and that certificates for the stock now in possession of the trustees, who are likewise before the Court, be surrendered. There are no more obstacles to the rendition of an effective decree than in any other case in which a stockholder seeks reparation for depredations upon the corporate property committed by directors, some of whom only are before the Court. Compare *Wineburgh* v. *United States Steam & Street Ry. Advertising Co.*, 173 Mass. 60; *Ernst* v. *Rutherford & B. S. Gas Co.*, 38 App. Div. 388; *Corry* v. *Barre Granite & Quarry Co.*, 91 Vt. 413; *Ganzer* v. *Rosenfeld*, 153 Wis. 442. The decree will be completely satisfied by delivery of the certificates, properly endorsed, to the corporation. There

is and can be no suggestion that such a decree cannot be pronounced and enforced as effectively by the courts in New York as it could be by those in New Jersey. Cf. *American Creosote Works* v. *Powell*, 298 Fed. 417, 419; see *Babcock* v. *Farwell*, 245 Ill. 14, 34.

The opinion of the Court concedes, as, indeed, the authorities which it cites show, that the decision does not rest upon any definite rule of general application. It is said that jurisdiction will be declined whenever considerations of convenience, efficiency and justice point to the courts of the state of the corporate domicile as appropriate tribunals for the determination of the particular case. Such considerations are said to require that this suit be dismissed though the petitioner is thereby subjected to all the hazards of starting his action anew, in the courts of New Jersey.

To support this conclusion, only two objections to the maintenance of the suit are suggested in the opinion of this Court or in that of the district court below. One is that numerous beneficiaries of the stock allotment, most of whom are not officers or directors of the corporation, are not made parties to this suit and presumably can be reached as a group only by suit in New Jersey. Hence, the intimation is, if we decide this case and other suits should subsequently be brought in other jurisdictions, different results may be reached on the same questions, a possibility which can be avoided by forcing the petitioner to bring a single suit in New Jersey. The other objection is that the Court would be called upon to decide a novel question of New Jersey law.

As petitioner has chosen to assert demands necessarily restricted to the stock issued by the directors to themselves, he had no occasion to join as parties the several hundred lesser employees, the great preponderance of whom received allotments of less than fifty shares of stock. Indeed, as the unconscionable conduct of the participating directors, a major factor in this case, would afford no basis for proceeding against the other allottees, it is by no means certain that the suit would be cast in any different form if brought in New Jersey.

The somewhat speculative possibility that those of the participating directors who have not been served with process in this suit may be called to answer in some other court and exonerated is of slight importance compared to the considerations favoring the exercise of jurisdiction. Petitioner has chosen to bring his

suit in New York. He and all but one of the individual defendants reside there. The principal office of the American Tobacco Company is in New York City and it is there that its books and records are found, its board of directors meets and the acts complained of took place. There the respondent, Guaranty Trust Company, is located, and its co-trustee resides. Before the decree can be enforced it must be obtained and the litigation must be brought to a successful conclusion. That involves the production in court of the necessary evidence. Of the parties to this case none but the American Tobacco Company is amenable to process in New Jersey; all are amenable in the Southern District of New York. In New York, petitioner can compel them and others connected with the corporation to attend as witnesses; all can be ordered to make complete discovery; and petitioner can compel the production at the trial of the records of both corporate defendants. We cannot assume that compulsion will not be necessary. The Tobacco Company carried to the highest court of the state its resistance to petitioner's preliminary application to inspect its books, (*Matter of Rogers* v. *American Tobacco Co.*, 143 Misc. Rep. 306, aff'd 233 App. Div. 708, leave to appeal denied). In New York also the individual defendants and the trust company can be reached by injunction *pendente lite*, restraining the transfer to innocent purchasers of the stock, certificates for which are already issued and in the hands of the trust company. Under the circumstances of this case, only considerations of more compelling force than the possibility of inconsistent decrees should lead a forum, convenient in so many respects, to decline jurisdiction.

I come then to the only ground which can plausibly be urged for declining the jurisdiction—that in one, but not necessarily a conclusive aspect of the case, the Court may be called on to decide questions of New Jersey law which, although novel, can hardly be said to be complicated or difficult. If there were any principle of federal jurisprudence, generally applicable, that in cases between private parties federal courts of equity may, in their discretion, decline jurisdiction because called upon to decide an unsettled question of state law, I would willingly acquiesce in declining it here. But this Court has not declared such a principle and does not recognize it now. On the contrary, whether juris-

diction rests on diversity of citizenship or on a substantial ~~federal~~ constitutional question, this Court has consistently ruled that it is the duty of a federal court of original jurisdiction, and of this Court on appeal from its decree, to pass on any state question necessarily involved, however novel, and that the decision may be rested on that ground alone. *Siler* v. *Louisville & Nashville R. R. Co.*, 213 U. S. 175; *Risty* v. *Chicago, R. I. & Pacific Ry. Co.*, 270 U. S. 378.

Unless we are now to abandon that long settled practice, I can see much more reason for passing on this question than upon many others which this Court has decided. Our judgment would conflict with no local decisions, compare *Black & White Taxi Co.* v. *Brown & Yellow Taxi Co.*, 276 U. S. 518; *Burgess* v. *Seligman*, 107 U. S. 20; nor apply an alien policy to matters which are the subject of delicate feeling in the state. Compare *Gelpcke* v. *City of Dubuque*, 1 Wall. 175; *Railroad Commission of California* v. *Los Angeles Ry. Corp.*, 280 U. S. 145. Indeed, we may not even avoid deciding the question of state law by sending the case to New Jersey, for it is not suggested that if petitioner should elect to sue in the federal court for New Jersey, or if the suit should be properly brought there by removal from the state court, either that court or this may decline jurisdiction. Thus we should do no more in deciding the question of New Jersey law now than if the case were brought to us from the federal courts in New Jeersey.

Even if decision of the question of New Jersey law were more embarrassing than it appears to be here, a proper exercise of discretion would seem to require that the bill be retained, and that an interlocutory injunction restraining any disposition of the stock by respondents be granted as prayed, pending the diligent prosecution by petitioner of a suit in New Jersey. Compare *Mallow* v. *Hinde*, 12 Wheat. 193; *Dunn* v. *Clarke*, 8 Pet. 1; *Stover* v. *Wood*, 28 N. J. Eq. 253.

If federal courts are to continue the general practice of deciding novel questions of state law whenever there are necessary or convenient grounds for the disposition of cases pending before them, there are peculiarly cogent reasons why there should be no departure from the practice in cases like the present. While a corporation in legal theory has only one domicile, in practice its activities are often nationwide and the legal domicile of the corporation, as in this case, is neither the place of its real corporate

life nor the home of its officers and directors. Hence, if stockholders' suits, such as the present, are to be maintained with any hope of success, the practical necessities of making parties, securing evidence, obtaining the production of documents and relief by injunction against individual wrongdoers, justify, if they do not compel, their prosecution in the particular jurisdiction where necessary parties and witnesses may be found, rather than in the place of the technical corporate domicile.

Extension of corporate activities, distribution of corporate personnel, stockholders and directors through many states, and the diffusion of corporate ownership, separated from corporate management, make the integrity of the conduct of large business corporations increasingly a matter of national rather than local concern (cf. A. A. Berle, Jr. and Gardiner C. Means, The Modern Corporation and Private Property [1932]), to which the federal courts should be quick to respond when their jurisdiction is rightly invoked. We should be slow, indeed, to make a reluctance to decide questions of state law, not exhibited in other classes of cases, the ground for declining to decide this one.

Mr. Justice BRANDEIS concurs in this opinion.

Mr. Justice CARDOZO.

Viewing the suit as one to reclaim the shares received by the directors in breach of their fiduciary duties to the corporation and the shareholders, I find no adequate reason for the refusal to exercise jurisdiction, and this though a different conclusion might be thought to be necessary if relief were to be given upon grounds affecting the validity of the issue as a whole.

In the circumstances of this case, the certificates allotted to the directors may be charged with a constructive trust, and surrendered to the corporation to be held in its treasury, without impeaching a single certificate other than their own.

There is no need to consider whether the "plan" as proposed is insufficient on its face, with the result that the innocent employees as well as the culpable directors will be deprived of its benefits. If it be taken as sufficient, the shareholders who voted for it are

not chargeable with notice that fiduciary powers would later be perverted by the award to the fiduciary of extraordinary benefits. Consent will not protect if reason and moderation are not made to mark the boundaries of what is done under its shelter.

I leave the question open whether in other circumstances or with other consequences there may be a cancellation of the shares of a foreign corporation in the absence of an adjudication by the courts of the domicile. Here the organic structure of the corporation, if affected by the decree at all, will not be changed in such a way as to work substantial detriment to any stranger to the suit, but the fruits of an unjust enrichment will be put back into the treasury. I think we are at liberty to do so much, if nothing more, without waiting upon the judgment of any other court.

The doctrine of *forum non conveniens* is an instrument of justice. Courts must be slow to apply it at the instance of directors charged as personal wrongdoers, when justice will be delayed, even though not thwarted altogether, if jurisdiction is refused. At least that must be so when the wrong is clearly proved. The overmastering necessity of rebuking fraud or breach of trust will outweigh competing policies and shift the balance of convenience. Equity, it is said, will not be over-nice in balancing the efficacy of one remedy against the efficacy of another when action will baffle, and inaction may confirm, the purpose of the wrongdoer. *Falk* v. *Hoffman*, 133 N. Y. 199, 203. Of the shares allotted to directors as contrasted with those allotted to other employes, most are owned by the defendants sued. Whatever shares belong to others will be untouched by the decree. With all the procedural complexities possible hereafter if jurisdiction be declined, the hazard of inconsistent judgments affecting the directors *inter se* will not avail without more to halt the processes of justice and the award of such relief as the court is competent to give against those subject to its power.

I agree with Mr. Justice STONE for the reasons stated in his opinion that a breach of the fiduciary duties of the directors is a legitimate inference from the allegations of the bill, and agree with his conclusion that the cause should be remanded to the District Court for a determination of the merits.